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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CITY OF YONKERS,

Petitioner,

vs.

UNITED STATES and YONKERS BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a district court exceed its equitable discretion in remedying housing discrimination when it does not defer to an adequate plan of a municipal defendant that meets the requirements of the Constitution and federal laws?

2. Does a district court exceed its equitable remedial discretion when it shifts administrative authority for implementation of a housing remedy from a governmental defendant that has not obstructed implementation of the remedy to a court-appointed special master?

PARTIES TO THE PROCEEDINGS

I. Active in this aspect of litigation:

City of Yonkers
United States
Yonkers Branch, National Association for the Advancement of Colored People

II. Not active in this aspect of the litigation:

Yonkers Board of Education
Yonkers Community Development Agency
State of New York, its Governor, and various other state officials
United States Department of Housing and Urban Development

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PETITION FOR A WRIT OF CERTIORARI

Petitioner City of Yonkers, a New York municipal corporation, respectfully prays that the Supreme Court of the United States grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on July 5, 1994, in appeal number 93-6342.

OPINIONS BELOW

This petition seeks review of the decision of the United States Court of Appeals for the Second Circuit affirming the Supplemental Long Term Plan Order entered by the U. S. District

Court for the Southern District of New York in the *Yonkers* housing litigation. The decision of the Second Circuit is reported as *United States v. Yonkers Board of Education*, 29 F.3d 40 (2d Cir. 1994); App. A-1-7.

The district court's Supplemental Long Term Plan Order is not reported, but appears in the Appendix to this petition. App. A-97-108.[1] The district court's order is based, in part, on two preliminary opinions issued from the bench during the trial of this matter. Transcripts of those opinions also appear in the Appendix. App. A-51-65; A-66-95.

JURISDICTION

The United States Court of Appeals for the Second Circuit issued its opinion affirming the district court's order on July 5, 1994. No petition for rehearing was filed. This Court has jurisdiction to consider this petition pursuant to 28 U.S.C. § 1254(1) and 2101(c).

CONSTITUTIONAL PROVISIONS

The City of Yonkers challenges the district court's order as exceeding the scope of the court's equitable remedial authority under the Fourteenth Amendment to the United States Constitution. Section One of the Fourteenth Amendment provides as follows:

> **Section one. Citizens of the United States.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

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[1] The form of citation used in this petition is as follows: Citations to the Appendix to this petition appear as "App." Citations to the Joint Appendix filed in the Second Circuit appear as "J.A."

STATEMENT OF THE CASE

This case presents an opportunity for the Court to address important principles of federalism that constrain the discretion of a federal court in fashioning a remedy for residential housing segregation. First, the lower courts ignored this Court's admonition that a district court should defer to a workable remedial plan fashioned by a local government to redress its own constitutional violation. Here, the district court rejected a workable plan proposed by the City, substituted its own remedy, and assumed the role of urban planner in an unnecessarily intrusive manner. Second, even though Yonkers has demonstrated its unquestionable good faith and legitimate desire to implement the remedial orders, the district court has stripped it of day-to-day administrative authority and reposed the implementation process in a court-appointed Housing Special Master. Both points present important issues of federalism that merit review by this Court.

A. The Remedy Orders and the Consent Decree

In 1985, the district court concluded that the City of Yonkers, New York, had unlawfully confined its public and subsidized housing to the predominantly minority southwest quadrant of Yonkers.[2] *United States v. Yonkers Board of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985). As a remedy for unlawful racial segregation, the district court entered the Housing Remedy Order ("HRO"), 635 F. Supp. 1577 (S.D.N.Y. 1986); App. A-8-24. The HRO required the creation of additional public and subsidized housing to integrate neighborhoods in east and northwest Yonkers. Initially, the City was required to provide sites for 200 new units of public housing. That portion of the remedy is virtually complete; 178 of the 200 units have been occupied and the remaining 22 will be ready within a few weeks. The second portion of the remedy, found in Section VI of the HRO, required the City to develop a plan for the creation of additional subsidized housing in east and northwest Yonkers. App. A-20-21.

On January 28, 1988, the district court entered a consent decree that established a long term goal of 800 units of subsidized

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[2] The district court had original federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331.

housing to comply with HRO Section VI. App. A-28-37. On June 13, 1988, the district court entered the Long Term Plan Order ("LTPO"). App. A-38-50. The LTPO required the City to adopt an Affordable Housing Ordinance ("AHO") and set forth a private-developer driven plan to construct affordable housing.[3] With the expectation of encouraging private developers to construct new units of affordable housing, the LTPO and the AHO used a combination of mandated incentives and a requirement that at least 20% of all newly constructed multi-family units in Yonkers be made available as affordable housing. The LTPO also created the Fair Housing Implementation Office ("FHIO"). App. A-49-50. FHIO, an agency created by and responsible to the court, was charged with seeking private developers to construct mixed-income housing that would fulfill LTPO objectives. *See id.*

B. The Need for a Modification

Conditions in the housing market changed, and with the general downturn in real estate, private developers proved reluctant to enter the assisted housing market. By late 1990, it became clear to the parties and the district court that modifications to the LTPO were needed if any results were to be obtained. Transcript of November 8, 1990 Hearing.

On June 5, 1991, plaintiff-intervenor NAACP moved the court to enter an order requiring the City to provide free land for the construction of 800 units of affordable housing in all-affordable projects. J.A. A-87. The United States supported the NAACP motion. J.A. A-258. On July 8, 1991, the City of Yonkers filed a cross-motion to vacate or modify the consent decree and the LTPO. J.A. A-360. On July 15, 1991, the court urged the City to produce an acceptable plan that the City would implement to meet its obligations under part VI of the HRO. J.A. A-566. The district court was receptive to the City's idea to provide economic assistance for the target group to purchase existing housing. Efforts to construct a plan continued through the end of 1991.

C. The Development of the City Plan

In November 1991, the citizens of Yonkers elected a new Mayor and City Council majority. Shortly thereafter, a new City

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[3] *See Spallone v. United States*, 493 U.S. 265 (1990).

administration took office committed to resolving the longstanding Yonkers housing litigation as expeditiously as possible.[4]

These officials made good on their promise to seek to comply with the 1986 Housing Remedy Order through development of a plan primarily utilizing existing housing — a plan that would be workable for city residents, owners of apartments, cooperatives, and condominiums and that would be successful in expeditiously implementing housing remedies. J.A. A-1671. The City sought input from the City Council, community leaders, the Department of Justice, the Yonkers NAACP, the Fair Housing Implementation Office, and others in numerous meetings over several months. J.A. A-1465-66, 1657-58.

Between January and April 1992, the City compiled information on the availability of existing housing, investigated potential sites for the construction of new housing, identified entities willing to finance mortgage subsidies, determined housing applicants' preferences for housing type and design, and educated the community as the alternative plan developed. The City concluded that once the program was fully operational, 450 units of existing housing could be filled over a period of four years. The 450 units would primarily include cooperative apartments and condominium units. J.A. A-1466-67.

After months of work, City officials completed the Yonkers Alternative Housing Plan ("City Plan"). J.A. A-873. When implemented, the City Plan would bring Yonkers into compliance with the Housing Remedy Order and achieve a modified LTPO goal of over 700 units of affordable housing in all parts of Yonkers over a four-year period. Following negotiations and modifications to the initial draft plan, the United States and the NAACP joined in support of the Plan. The City Plan was adopted in

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[4] In 1989, the Yonkers City Charter was amended to change the form of government from a Council-Manager format to a strong Mayor-Council arrangement. In November 1991, Terence M. Zaleski was elected Mayor. He and three new councilmembers took office on January 1, 1992. The Mayor and a majority of the new Council openly campaigned on platforms to comply with the court orders and otherwise fairly seek a resolution of the City's longstanding housing litigation.

a highly publicized and emotional City Council meeting on April 14, 1992. J.A. A-690.[5] The adopted City Plan was submitted to the court the next day. The parties worked for several weeks on a consent order incorporating the Plan. Although the Plan had previously been found acceptable by all parties, the NAACP eventually balked and refused to join in an order. J.A. A-904. The City moved the court to enter its proposed Order implementing its Plan. App. A-112-147.

The City Plan utilized three separate sources of housing to achieve its target of 709 affordable housing units over four years. J.A. A-874. The Plan provided for the purchase of 450 existing units on the open market, the construction of 115 new units, and the rehabilitation of 144 vacant units in southwest Yonkers. The Plan concentrated on existing housing units, because such housing: a) can be occupied more quickly and easily than units that must be built or rehabilitated; b) is less costly than new construction; c) does not further damage the depressed housing market in Yonkers; and d) is a highly integrative tool. The City Plan's new-construction component initially required 115 townhouses, the type of housing preferred by applicants, initially on four designated sites. J.A. A-877-78. The Plan confronted the need for home ownership and mortgage counselling, and provided adequate funding through direct subsidies and inexpensive mortgage financing.

On July 15, 1992, the court held a hearing on the revised motions and advised that it saw promise in the City Plan and its use of existing housing as the most practical, integrative remedy

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[5] In addition to adopting an alternative housing plan that had the support of a majority of City government, the Council's resolution cleared many other roadblocks to compliance with federal court orders. It settled an administrative proceeding with HUD that allowed the City to receive some $14 million in Community Development Block Grant funds. In contrast to earlier actions requiring court orders to transfer title, it provided that the City would voluntarily deed the two remaining sites for public housing to the selected developer. *See United States v. Yonkers Board of Educ.*, 927 F.2d 85 (2d Cir. 1991), *cert. denied*, 116 L. Ed. 2d 45 (1991). And, it authorized payment by the City for extension of the county bus system to some of the new public housing sites. The resolution marked the end of an era of City opposition to the HRO and served as an indication of the political will to resolve the housing dispute in Yonkers.

available. J.A. A-1227-28. The court directed the City to demonstrate that its Plan was realistic and would result in affordable housing outside of southwest Yonkers. Judge Sand directed the City to work with FHIO in implementing its Plan. The City was to identify and inspect units and consult with FHIO to develop a mutually acceptable final list of units. It was FHIO's responsibility to identify housing applicants who qualified for affordable housing under the LTPO and to certify qualified applicants to the City to match them with acceptable housing units. J.A. A-1230-31, 1475. The court held in abeyance the various motions for modification of the LTPO.

D. The City's Efforts to Implement Its Plan

The City's efforts from July 1992 to March 1993 demonstrate its good-faith intent to make the Plan work and to achieve compliance with the goals of the LTPO. The City began the demonstration effort by inviting cooperative owners who were interested in selling their units as a part of the City Plan to contact the City. J.A. A-1477-78. Approximately 200 owners responded immediately to the offer. City planners, together with FHIO representatives, inspected many of the 200 units tendered and decided to use 70 units as the demonstration pool. J.A. A-1489-90, 2197.

In addition to soliciting existing units and inspecting them, the City took steps to gain cooperative and community support for its Plan. The City placed an advertisement in local newspapers explaining the Plan. J.A. A-1477, 1667-68. The Mayor appeared on cable television to discuss the Plan and conducted a series of informative breakfast meetings for cooperative-board members. J.A. A-1469, 1478-80.

To launch the mortgage approval process for housing applicants, the City coordinated its efforts with Chase Community Development Corporation. The City and Chase scheduled a seminar to explain the steps involved in the mortgage and homeownership process and developed a system through which Chase could pre-approve applicants for mortgages. J.A. A-1486-88. In September 1992, the City requested a list of qualified housing applicants from FHIO in order to send out invitations to the Chase seminar. FHIO refused to provide names to the City and

insisted that it would send out the invitations to the Chase seminar. FHIO delayed in sending out invitations and, after lengthy negotiations with FHIO, the seminar finally was held October 31, 1992.

At a November 17, 1992 conference with the court, the City indicated that it had identified a pool of available housing and was ready to work directly with potential beneficiaries, but was still waiting for housing applicants and their files from FHIO. J.A. A-1515. The City needed the information contained in the files to match applicants' housing preferences and financial status with the approved units in order to show the units and move toward sales. While this ambitious goal had not been part of the original court mandate, which was only to "identify units" for the Plan rather than complete closings during the demonstration period, the City in good faith sought to bring about closings. FHIO Executive Director Karen Hill promised to provide approximately 100 files within ten days. FHIO did not meet the deadline. Instead, FHIO sought a court order to ensure the confidentiality of the housing-applicants' identities. An order was finally entered on December 17, 1992. J.A. A-1267.

FHIO finally sent, not 100, but twenty-two housing-applicant files to the City on December 22, 1992. The "files" contained only one page of the four-page application designed by FHIO. Missing from the 22 files were, among other information, the applicants' family size, income bracket, housing preference, ability to incur a long-term financial obligation, and the credit-release form that Chase needed to begin pre-qualifying the applicants for mortgages. J.A. A-1516-17. The City trained two of its staff to interview the 22 families to reconstruct the missing information. The City had the applicants sign a request for Chase's services because FHIO refused to turn over the applicants' credit-release forms, again arguing privacy concerns. Chase and the City then jointly set up appointments to take mortgage applications. Of the initial 22 families, 18 asked to be referred to Chase and 15 were ultimately pre-approved for a mortgage. J.A. A-1518-19. The City hired two "buyer brokers" in January 1993 to show housing to applicants who qualified for a loan. J.A. A-1534.

In February of 1993, the City asked the court to permit a change in the method of obtaining units; rather than soliciting individual prospective sellers, the City asked to begin using all of the units on the Multiple Listing Service that fit the court-mandated criteria as a baseline. J.A. A-1535. The court approved this request, which greatly broadened the housing options for applicants.

In order to expand the base of prospective purchasers, the City continued to request more housing-applicant referrals and files from FHIO. In January, FHIO told the court it would provide some 1400 applicant files to the City, but FHIO delayed delivery of any files. J.A. A-1520. By March 1993, FHIO provided 950 "files," which contained no more information than those previously provided. *Id.* Files for the other 450 "applicants" did not exist.

Given the lack of information the City was receiving from FHIO and the difficulties in qualifying FHIO applicants for loans, in early March 1993, the City hired Penn & Schoen, a market research firm, to conduct a survey of the applicants identified by FHIO. J.A. A-1524-25. The market research firm decided to contact each of the applicants by telephone and interview them to determine their family characteristics and the kind of housing needed. Penn & Schoen was ultimately given 908 applicant names and any other information the City had received from FHIO. A large number of the applicants could not be reached. J.A. A-1695-96. Of those contacted, 48 chose not to participate. Penn & Schoen eventually was able to complete 391 interviews. J.A. A-1706. The survey revealed that for the 391 applicants interviewed, of those who filled out a housing application with FHIO, only 24% were referred to housing and, of that group, only 7% actually visited the housing to which they were referred. J.A. A-1704. Of those who filled out a housing application with FHIO, only 15% were provided with credit counselling and only 13% were provided with mortgage counselling, both of which are essential for most of the families that qualify for affordable housing under the LTPO. J.A. A-1704-05. Penn & Schoen ultimately concluded that FHIO had not properly prepared its applicants for home ownership responsibilities. Exhibit AY at 27-28.

Seeking to further expand the base of active housing purchasers, the City scheduled two more seminars with Chase on April 3

and April 21, 1993 to explain the technical processes of mortgage application and home ownership. J.A. A-1520-21. The City invited 170 FHIO-certified applicants. J.A. A-1522. Due to the many erroneous addresses in the FHIO applicant files, only fifty-two applicants attended the seminars. Of that fifty-two, thirty-nine applied for housing but only eleven qualified for mortgages. J.A. A-1523. The City promptly put the 22 applicants who did not qualify in touch with an organization that provides credit counselling at no cost. J.A. A-1530-33.

It became clear to the City that FHIO had not properly counselled the applicants regarding home ownership and the mortgage approval process. Exhibit BP at 4-21 to 4-22; J.A. A-1704-05. Many had poor credit histories and could not qualify for a loan — no matter what the subsidy was. With appropriate counselling upon applying for housing with FHIO, these applicants could have "cleaned up" their credit records to gain approval by a lender. Frustrated by FHIO's failure to provide complete files on housing applicants, by the poor attendance of applicants at the April seminars due to errors in FHIO files, and by the inability to qualify FHIO applicants for mortgages, the Mayor decided to put further initiatives in place to attract a wider pool of applicants, notwithstanding the court's earlier direction to use only FHIO-certified applicants. City planners designed and placed a newspaper advertisement and mailed flyers to all residents of west Yonkers. J.A. A-1526-28. Phone banks and a counselling staff were set up at City Hall to service a huge response. By the time the trial began in June, the City had received 730 responses and was aggressively interviewing these applicants from 10:00 a.m. until 6:30 p.m. each day to take applications and obtain the necessary information. J.A. A-1528-30. In just a few weeks, the City almost equalled the number of applications taken by FHIO over a three-year period.

E. The Modification Proceedings

During March 1993, the court advised the parties that it would hold an evidentiary hearing to review the City's Plan as implemented during the demonstration period and to evaluate any other proposals to further the LTPO. The City's consultants compiled reports in preparation for these hearings that reviewed the

provisions and benefits of the Yonkers Alternative Housing Plan. Exhibits AY, BP and DG.

FHIO also completed a comprehensive report that contained plans for new construction on 18 different sites and some small-site construction on undesignated sites. Exhibit 200. The eighteen FHIO sites included the four sites identified for new construction by the City, privately held sites for which FHIO had obtained purchase options, and other sites owned by the City of Yonkers. The FHIO Plan relied heavily on higher density new construction projects on eighteen different sites. FHIO proposed that its homeownership projects would be developed on a 50% affordable/50% market-rate basis, while rental projects would include units on a 30% affordable/70% market-rate basis. The FHIO report included a limited proposal for the use of existing housing at a rate of 30 units per year for four years.

The Court bifurcated the issues to be tried. The court first received five days of trial testimony regarding the City's effort to demonstrate the efficacy of its existing-housing plan. That testimony showed that the City had identified over 450 units through the Multiple Listing Service, other available housing, and blocks of vacant sponsor-held housing. J.A. A-1745, 1753, 2139-41. The City also submitted four sales contracts it had negotiated for housing applicants.[6]

At the close of the existing-housing phase of the trial, the district court rendered a preliminary opinion from the bench. The court agreed with the City that existing housing should be used to the maximum extent possible, but rejected the City's goal of 450 units of existing housing and adopted a 250-unit goal. App. A-62-63. The court also directed that the City should not be the primary implementing agency, but that a contract should be entered with a qualified outside entity to implement the existing-housing portion of the remedy. Although the City had previously advised

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[6] The court refused to allow those contracts to close until FHIO agreed that the units were suitable. J.A. A-2820. Efforts continued after the hearing to close those contracts, but several of the applicants grew impatient and withdrew. On December 1993, one of the contracts closed. The City provided some $28,000 in downpayment assistance to facilitate the purchase of a cooperative on an affordable basis by this housing applicant.

the court that it had no objection to these two points, J.A. A-1270, the City continues to contend that its 450-unit goal for existing housing is appropriate and that primary reliance on new construction is wrong.

The court received an additional week of testimony regarding the new-construction portion of the remedy. FHIO experts urged the court to approve FHIO's proposed mixed-income new-construction projects that would yield over 1,500 units in seventeen high density projects. FHIO consultant Henry Wollman, however, testified that the FHIO plan proposals were "preliminary." J.A. A-2549, 2587, 2617, 2630. In addition, FHIO did no environmental assessments of the new-construction sites, no engineering studies, and no thorough estimates of the projected costs of the new units. J.A. A-2561, 2584-88, 2619, 2652-53. Moreover, FHIO has never demonstrated the availability of the $51 million in subsidies required to fund its proposal or a market for its market-rate units. Exhibit BP at 4-34 to 4-39; J.A. A-1853-59.

The City presented testimony supporting the use of its low density 100% affordable townhouse projects on four designated sites. J.A. A-2713-63. That evidence showed that the City's new construction approach had been successfully implemented by the City at the Trinity Court project, would require smaller public subsidies, and could be promptly developed.

On July 13, 1993, the court rendered a second preliminary opinion from the bench rejecting the City's new-construction plan as an under-utilization of the sites and adopting the high density FHIO proposals on three of the proposed eighteen sites. App. A-76-85. The court noted that sufficient questions had been raised regarding the efficacy of the FHIO plan, the financial pro formas, the availability of the subsidies, and the marketability of the market-rate units included in the FHIO plan to justify limiting the remedy initially to the issuance of Requests For Proposals ("RFPs") to developers utilizing the general parameters of the FHIO plan as it pertained to three sites. App. A-76, 81. The court directed that RFPs be prepared for the Yonkers Avenue site (98 units, rental), Cross Street site (28 units, ownership), and Hoover

Road site (48 units, ownership).[7] The court ordered further studies of the additional sites and directed that further orders governing the second wave of new-construction projects would follow.

In September 1993, the parties submitted proposed orders to the court incorporating the provisions of the two opinions described above as well as the structure proposed by the parties for implementation of the various plans that the court had approved. The City's proposal called for elimination of FHIO implementation responsibilities and delegation of those tasks to outside entities contracted for by the City following a selection process with the participation of all parties. J.A. A-3058. The City called for the appointment of a monitor. J.A. A-3069. The United States, too, suggested the appointment of a monitor, along with some limited FHIO involvement in implementation to be transferred over time to other entities. J.A. A-3029.

The court entered the Supplemental Long Term Plan Order Adopting Additional Remedial Measures on October 5, 1993. App. A-97-108. The Order rejected the City Plan, set forth a framework for the construction of new housing on three sites as recommended by FHIO, established a schedule for the utilization of 250 existing housing units, and announced that the court would designate a Housing Special Master to oversee the day-to-day administrative implementation of the court's housing orders. In all other respects, the motions for modification were denied.

F. The Second Circuit's Decision

The City appealed, maintaining that the district court had overstepped the bounds of its equitable remedial authority (1) by failing to defer to the City's workable remedial plan and (2) by effectuating a wholesale shift of authority over implementation of the housing remedy from the City to a court-appointed Housing

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[7] During the period from July through November 1993, the FHIO experts who testified at the hearing developed first draft RFPs and other plans and conducted environmental reviews on the three sites (at a cost estimated to be in excess of $500,000.00). In November 1993, the Housing Special Master ("HSM") assumed control of the process and stopped work by the FHIO consultants. Most of the work is now performed by the HSM's staff. The HSM has issued RFPs for construction at the Cross Street and Hoover Road sites and selected an agency to implement the existing housing remedy. No housing units have yet been created under the HSM's administration.

Special Master. The United States Court of Appeals for the Second Circuit affirmed the district court. *United States v. Yonkers Board of Education*, 29 F.3d 40 (2d Cir. 1994); App. A-1-7.

The Second Circuit rejected the City's argument that the district court had abused its discretion by rejecting the City Plan. The court acknowledged a federal court's duty to respect the integrity and function of local government. *Yonkers*, 29 F.3d at 43; App. A-5. However, the court then stated that "the district court has not only the power but the duty to ensure that the defendant's proposal represents *the most effective means* of achieving desegregation." *Yonkers*, 29 F.3d at 43; App. A-5 (emphasis added). The court held that the district court did not abuse its discretion by rejecting the City's plan. *Yonkers*, 29 F.3d at 43; App. A-6.

The court also rejected the City's challenge to the district court's appointment of the Housing Special Master to implement the Supplemental Long Term Plan Order. The court recognized that "a special master vested with authority to implement a court's order poses a greater threat of intrusion than one whose authority is limited to monitoring compliance with that order," but the court saw no basis to disturb the trial court's use of a special master with broad authority to implement the modification in this case. *Yonkers*, 29 F.3d at 44; App. A-6-7.

The City now petitions this Court to review the Second Circuit's decision. The Second Circuit has allowed the district court to overstep the bounds of its equitable remedial authority, assuming wholesale the role of local government in administering local subsidized housing programs.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT EXCEEDED ITS EQUITABLE DISCRETION IN REMEDYING HOUSING DISCRIMINATION WHEN IT DID NOT DEFER TO AN ADEQUATE REMEDIAL PLAN OF A MUNICIPAL DEFENDANT THAT MET THE REQUIREMENTS OF THE CONSTITUTION AND FEDERAL LAW.

Although a district court has broad equitable remedial powers, those powers are not without limit. This Court has consistently held that federal courts, in fashioning and modifying equitable

relief, must "take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977). This principle applies in housing desegregation cases as well as in school cases. *Hills v. Gautreaux*, 425 U.S. 284 (1976). It is an inherent and fundamental limitation upon a federal court's equitable remedial powers. The district court's order fails to adhere to basic principles of federalism by rejecting a good-faith, reasonable proposal of a civil rights defendant to rectify its constitutional violation and by imposing the court's own plan to be implemented by a court-supervised bureaucracy. Rather than deferring to the judgment of local authorities, the district court has assumed the role of local government by imposing its own plan and then stripping the City of day-to-day control of the implementation process.

The principle of respect for state and local authorities is a strong constant in this Court's desegregation decisions. In *Missouri v. Jenkins*, 495 U.S. 33 (1990), this Court rejected the district court's usurpation of local taxing authority, explaining that:

> We have emphasized that although the "remedial powers of an equity court must be adequate to the task, . . . they are not unlimited," and *one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions.* Especially is this true where, as here, those institutions are ready, willing, and — but for the operation of state law curtailing their powers — able to remedy the deprivation of constitutional rights themselves.

Id. at 51 (emphasis added). This Court noted that there may be more than one constitutionally permissible method of solving desegregation, but it insisted that "local officials should at least have the opportunity to devise their own solutions to these problems." *Id.*[8]

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[8] In even stronger language, Justice Kennedy condemned the detail with which the district court had constructed its desegregation order. He wrote that: "An initial finding of discrimination cannot be used as the basis for a wholesale shift of authority over day-to-day school operations from parents, teachers, and elected officials to an unaccountable district judge whose province is law, not education." *Id.* at 77 (Kennedy, J., concurring).

The principles of *Milliken* and *Jenkins* also apply to the modification of remedial decrees. In *Rufo v. Inmates of the Suffolk Co. Jail*, 502 U.S. ____, 116 L. Ed. 2d 867, 891 (1992), this Court set forth three clear guidelines to be applied by a federal court when evaluating a proposed modification:

- "[A] modification must not create or perpetuate a constitutional violation."
- "[T]he focus should be on whether the proposed modification is tailored to resolve the problems created by the change in the circumstances."
- "[T]he public interest and 'considerations based on the allocation of powers within our federal system,' *require that the district court defer to local government administrators*, who have the 'primary responsibility for elucidating, assessing, and solving' the problems of institutional reform, to resolve the intricacies of implementing a decree modification."

This Court explained:

> Once a court has determined that a modification is warranted, we think that principles of federalism and simple common sense require the court to give significant weight to the views of the local government officials who must implement any modification.

Id. at 891 n.14.

The rule of deference could not be more clear. The Second Circuit and the district court have simply abandoned *Rufo* in evaluating the City's proposed modification. Here, there was no dispute over the need for a modification to the 1988 Long Term Plan Order. The LTPO simply was not producing any results that would remedy the violation found by the district court's 1985 liability decision. The City proposed a workable plan that would provide a fair remedy. Rather than *defer* to the City's Plan, however, the district court assumed the role of urban planner and set out to test which plan – that of the City or the court's

own agency — was the better plan. The district court undertook to micromanage urban planning in Yonkers by determining the type of construction, the density of developments, the layout of developments, and other aspects of the remedy issues beyond the province of a district judge.

It is abundantly clear that the City Plan was not unconstitutional or in any way violative of federal law. It was fairly designed to remedy the violations within a reasonable period of time. The court, however, did not credit the City's lower density approach that took into consideration good planning techniques and the interests of adjoining communities while still providing a fair remedy. Instead, the district court opted for high density projects that would create greater intrusions on local communities at greater costs. Rather than deferring to the plan created by the City's managers, the district court took the approach that, arguably, had the greatest immediate desegregative effect at the expense of other legitimate policy considerations.

The Second Circuit endorsed this approach: "The district court has not only the power but the duty to ensure that the defendant's proposal represents *the most effective means* of achieving desegregation." *Yonkers Board of Education*, 29 F.3d at 43 (emphasis added); App. A-5. Such an approach is contrary to *Rufo*. *Rufo* requires a court to "defer to local government administrators, who have the 'primary responsibility for elucidating, assessing, and solving' the problems of institutional reform, to resolve the intricacies of implementing a decree modification." *Rufo*, 116 L. Ed. 2d at 891. In another case, the Second Circuit has accordingly cautioned district courts:

> (1) not to use a sledgehammer where a more delicate instrument will suffice, (2) not to move too quickly where it appears that the state, in the exercise of administrative authority, will in its own way adopt reforms bringing its system into compliance with the Constitution, and (3) to give the state a reasonable opportunity to remedy a constitutional deficiency, imposing upon it a court-devised solution only if the state plan proves to be unfeasible or inadequate for the purpose.

Dean v. Coughlin, 804 F.2d 207, 213 (2d Cir. 1986). In fact, the Second Circuit has found that a district court abused its discretion by not deferring to a local government's "carefully and conscientiously formulated remedial plan as the basis for relief, with such modifications as might appear essential to assure compliance with minimum constitutional requirements." *Id.* at 215.

The appropriate modification analysis is not whether a local government's proposed modification "represents the most effective means of achieving desegregation." *Yonkers Board of Education*, 29 F.3d at 43; App. A-5. Rather, the appropriate analysis is — as other circuits have held — whether the local government's proposed modification is the least intrusive remedy available to bring the local government into compliance with the mandates of the Constitution. *See Kendrick v. Bland*, 740 F.2d 432, 437 (6th Cir. 1984) ("[I]t was incumbent upon the district court in the action sub judice to impose the least intrusive remedy available."); *United States v. City of Parma, Ohio*, 661 F.2d 562, 579 (6th Cir. 1981) (rejecting a remedy that did not "represent the least intrusive method of achieving the government's stated goal in this case of making [the city] a community which will offer low income persons and members of minority groups some choice as to where they will live"), *cert. denied*, 456 U.S. 926 (1982).

While the district court has an important responsibility to ensure that the defendant's plan will fairly remedy the violation, it is not to substitute its judgment for that of local officials in determining which of several adequate approaches may be best. Indeed, this fundamental principle of federalism is critical in defining the scope of a district court's equitable discretion.

Yonkers is no longer in default of its obligations to implement a fair housing remedy. Rather, the record shows that the City and its elected officials have, for the past three years, engaged in aggressive and sincere efforts to implement the district court's desegregation requirements. The City elections of November 1991 marked a new era in the City's approach to housing remedies. Prior to 1991, City leaders had defied the district court and been recalcitrant in complying with the 1986 Housing Remedy Order. These years of noncompliance earned Yonkers the ire of the district court and resulted in a nationally-publicized contempt

order against the City in 1988. *See Spallone v. United States*, 493 U.S. 265 (1990). The Mayor and City Council who were elected in November 1991 had campaigned as pro-compliance candidates. They saw the opportunity to solve this longstanding obstacle to progress in Yonkers. Mayor Zaleski summarized the new attitude of the government and community of Yonkers when he testified at the hearing:

> I'm very gratified that over the past year and a half, as we have been working through this remedy order and we have been developing the consensus of support throughout the community that our alternative long-term plan has achieved, that actually a sense of some repose has actually fallen upon the city, that the people of the City of Yonkers feel that there is a city administration that is in control that wants to move forward, that wants to deal with these issues and wants to get on with the future of Yonkers, and part of that future is recognizing our constitutional obligations and providing the affordable housing that is necessary consistent with this long-term plan order.

J.A. A-1672.

The lower courts simply refused to acknowledge that a plan offered by Yonkers is entitled to any deference. Unlike the years of obstruction and delay by prior Yonkers officials that characterized the public housing phase of this litigation, the City of Yonkers now has acknowledged its obligation to provide a fair remedy. The City Plan was designed to do exactly that. The district court not only ignored the good faith efforts of the City to develop a workable remedy, but ignored the merits of the City Plan itself. Instead, the court approved, despite its flaws, the plan proposed by FHIO, a court-created agency, thus usurping a role in desegregation that the law accords to local officials. The City Plan maximizes reliance on existing housing before looking to new construction. The use of existing housing is the most viable, economic, and integrative solution by providing units that are *currently* available. J.A. A-1751, 2804. FHIO's plan, on the other hand, relies primarily upon expensive new construction that will add new units to an

already depressed housing market and will require construction activity into the next century. J.A. A-1743-44, 2501, 1863.

The City's Plan includes a number of provisions to ensure the efficient production of integrative affordable housing to meet the needs of the targeted beneficiaries. *First*, the City Plan, unlike FHIO's, contains vital provisions for credit and mortgage counselling. J.A. A-1522-24, 2039. *Second*, the City's funding sources are adequate to finance the existing housing and new construction envisioned by the City Plan. The City Plan would cost far less to implement than the FHIO plan.[9] *Third*, the City's new construction proposal incorporated an integrative, applicant-preferred townhouse design. FHIO contemplates buildings with 50% affordable units and 50% market-rate units. The addition of so many new market-rate units is not only unnecessary but would damage the local economy by adding more units than the soft real estate market in Yonkers can bear. J.A. A-1864. Furthermore, the higher density FHIO designs do not enhance the beneficiaries' ability to be integrated into the surrounding community. J.A. A-1864-65, 2762. The townhouse style proposed by the City is more in line with the preferences expressed by housing applicants and worked well when utilized in an earlier successful City-sponsored project. Nonetheless, the district court erroneously rejected the City's proposal for this type of housing finding that more units could be placed on each site. Although Judge Sand characterized the City Plan as creating "enclaves" that would not blend into the surrounding community, the City specifically chose the lower density townhouse design to further integration.[10]

During the implementation process, the City demonstrated its flexibility and willingness to adapt its Plan to respond to the concerns of other parties and the court. The government's expert, Richard Cohen, submitted a report suggesting changes to the

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[9] The City Plan had projected required public subsidies of $34 million compared to the FHIO Plan's projected public subsidies of $51 million. *See* Exhibit BP at 4-17, 4-28.

[10] FHIO's pro forma for the Yonkers Avenue site, for example, is a 98-unit, 7-story building on one acre of land. J.A. A-2539-42. The adjacent properties contain single-family residences and low-rise commercial buildings. *Id.* The FHIO proposal is unquestionably incompatible with the surrounding neighborhood. J.A. A-1865-69. Nevertheless, the district court approved it simply because it placed more units on the site.

City's existing housing plan, such as adding a rental component and an aggressive effort to purchase large blocks of sponsor-held units in cooperative complexes. The City agreed to incorporate many of those improvements in its Plan. J.A. A-1270. Although the City Plan already contained a lease-purchase program, the City also agreed to incorporate a rental component in its Plan as well. The City committed to aggressively pursue blocks of sponsor-held units in order to reach its 450-unit goal.[11] Those changes in the City Plan should have more than adequately answered the concerns of the court.

The court, however, subjected the City Plan to a far more rigorous scrutiny than it applied to its own FHIO-developed proposal. FHIO's plan has fundamental weaknesses which will prevent achievement of LTPO goals. Unlike the City Plan, the FHIO plan is merely a series of proposals that were not tested before submission to the court. FHIO expert Henry Wollman labelled the FHIO proposals "preliminary." J.A. A-2549, 2630, 2652-53. No environmental assessment was done of the sites proposed by FHIO. None of the necessary engineering studies were done. No appraisals were completed to determine whether the option prices were fair.[12] J.A. A-2501, 2584-2585, 2619. There were no thorough estimates of the projected costs of the new units. Wollman admitted that if the projects were to go forward, there could be substantial cost swings during the construction process. J.A. A-2587.

There was no demonstration of any market for the market-rate units in FHIO's plan. FHIO never considered who would bear the financial costs if the market-rate units were not sold, which is a distinct possibility in light of the soft housing market in Yonkers. J.A. A-2522-23, 2530. FHIO never considered that its higher priced market-rate units are similar to the high-quality condominiums that currently stand unsold in Yonkers. J.A. A-2516. FHIO never prepared any type of market study to ascertain

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[11] The City submitted testimony of a representative from the Hudson View cooperative demonstrating the City's willingness to assist that project through facilitation of the sale of a block of sponsor-held units to affordable housing applicants. J.A. A-1945-46, 1951-53.

[12] FHIO expert Wollman was unaware that such appraisals are required by the regulations governing the expenditure of federal funds in this context. J.A. A-2585.

applicants' preferred housing designs, or housing demand generally, until a few weeks before the hearing in June 1993. FHIO had found sites and developed pro forma plans for units long before it had access to the results of this market study. Exhibit BP at 4-12; J.A. A-2498. The City submitted uncontroverted evidence suggesting that FHIO's pre-trial market studies were grossly inflated and unreliable. Exhibit BP at 4-13.

Aside from the tentative nature of FHIO's proposals, FHIO's new construction proposals are more expensive and require greater subsidies than the City Plan. J.A. A-1851-53. For example, FHIO's proposal for the St. James site envisions a subsidy of $179,000 per affordable unit. Its proposal for rental units at the Warburton #7 site requires a subsidy of $373,335 per affordable unit. J.A. A-2593. FHIO consultant Wollman admitted that he had never seen an affordable housing project that received subsidies at the level he was proposing. J.A. A-2506.

While the City was held to a standard of showing that "the money is in the bank," FHIO never demonstrated the availability of the subsidies needed to fund its proposals. J.A. A-1853-59. FHIO needs massive subsidies for its "market-rate" units. At the Lake Avenue site, for example, only six units are restricted as affordable, yet FHIO has requested $7.7 million in subsidies for that project. *That is over $1.2 million per subsidized unit.* J.A. A-2599. The market-rate units at Cross Street are projected to cost $183,000 to build, while the projected sales price is only $159,000. J.A. A-2615. The market-rate units at Hoover Road will cost $157,000 to build, while the projected sales price is only $141,500. J.A. A-2624. The market-rate units at Midland will cost $177,000, while the estimated sales price is $135,900. FHIO's plan is not fiscally viable.

FHIO's plan will take far longer to implement than its proposals suggest. Wollman testified in June 1993 that at the earliest, occupancy of the first 14 affordable units would not take place at least until early in 1995.[13] J.A. A-2501, 1863. It became clear

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[13] Such an optimistic schedule will not be met. At this time, the first project under the currently-approved district court/FHIO plan may be completed early in 1996. The delays here are not attributable to the City; they are the fault of the district court's own bureaucracy and their unnecessarily elaborate plans.

at trial that the environmental review process could easily extend the occupancy date far beyond 1995. J.A. A-2551-55. The City's Plan will result in occupancy for housing beneficiaries much earlier, due to the existing housing component and the simplicity of the City's new construction plans. *See* J.A. A-2034.

The flaws in the FHIO proposals only underscore that the district court's assumption of local responsibility for urban planning is simply an inappropriate exercise of its judicial power. In *Missouri v. Jenkins*, four members of this Court recognized that "defendants that are public entities act in the highest and best tradition of our legal system when they acknowledge fault and cooperate to suggest remedies." *Jenkins*, 495 U.S. at 59 (Kennedy, J., concurring). That is precisely what has happened here. The City has acknowledged fault and has cooperated in providing a workable modification to the district court's original order. In 1991, the Yonkers voters elected a pro-compliance mayor and a pro-compliance council. The new administration and the new council developed a workable remedial plan. In so doing, the voters through their elected representatives determined the manner in which they wanted to bring subsidized housing in Yonkers into compliance with the mandates of the Constitution. The district court, by rejecting the City Plan, effectively has exercised a judicial veto over the voters' legislative choice.

The Second Circuit in its *Yonkers* decision suggests that it is acceptable for a federal court to remove such decisions from "political pressures." *Yonkers Board of Education*, 29 F.3d at 44; App. A-7. Stated more accurately, the district court's order in effect removes those decisions from *political accountability*. As Justice Kennedy has explained, "our Federal Judiciary, by design, is not representative or responsible to the people in a political sense; it is independent." *Jenkins*, 495 U.S. at 68. It is inevitable that the imposition of burdens "by an authority so insulated from public communication or control can lead to deep feelings of frustration, powerlessness and anger on the part of tax paying citizens." *Id.*

Here, the federal judiciary has imposed its own costly and flawed housing remedy and has disregarded the good faith modification proposed by the local government. At best, the court's remedy is expensive and untested; at worst, it is a remedy

far more intrusive than necessary to remedy the constitutional violations. Accordingly, the City asks this Court to grant its petition for a writ of certiorari to review the district court's rejection of the Yonkers Alternative Housing Plan.

II. THE DISTRICT COURT EXCEEDED THE SCOPE OF ITS EQUITABLE REMEDIAL DISCRETION WHEN IT SHIFTED DAY-TO-DAY ADMINISTRATIVE AUTHORITY FOR IMPLEMENTATION OF A HOUSING REMEDY FROM A COOPERATING GOVERNMENTAL DEFENDANT TO A COURT-APPOINTED SPECIAL MASTER.

The City also asks this Court to review the district court's appointment of a Housing Special Master ("HSM") to administer the details of judicial control over subsidized housing in Yonkers. In so doing, the district court has undertaken to micromanage the implementation and administration of the housing remedy, abandoning any sense of appropriate *Milliken* restraint. The court's appointment of the Housing Special Master is inconsistent both with the precedent of this Court and the approach and restraint used by other circuits.

The district court's housing bureaucracy in Yonkers is already immense. In 1987, the court appointed its own housing advisor, Oscar Newman, to implement the public housing portion of the remedy.[14] More significantly, the court since 1988 has had in place the Fair Housing Implementation Office, an administrative agency responsible solely to the court.[15] The Long Term Plan Order authorizes FHIO to act as an ombudsman before all City agencies, to pre-approve particular proposals, to assist developers in the application process, and "to implement such other administrative steps as may be required or convenient for the more

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[14] Since 1987, by order of the court, the City has paid Newman over $1 million to coordinate implementation of the public housing construction program.

[15] FHIO, a court-created City agency, has an annual budget of some $500,000. The City pays its Executive Director over $90,000 per year – by court order. App. A-96, 109. FHIO has its own legal counsel at a cost to the City of $190,000 per year. In addition, the district court has given FHIO control of 25% of the City's annual CDBG allocation – approximately $1 million per year. App. A-49-50.

effective realization of the objective of achieving [the court's goals]." App. A-49-50. With the appointment of a Housing Special Master, the judicial bureaucracy in Yonkers grows on. The district court now has its own public housing advisor, its own implementation agency, and its own housing special master with a separate staff.[16]

The City objects not only to the addition of yet another layer of judicial bureaucracy, but more importantly to the broad scope of legislative and administrative power delegated to the Special Master. Typically, a special master in a complex institutional reform case is used to monitor compliance with a remedial plan and to report to the court on the parties' progress. *See, e.g., Miller v. Carson*, 563 F.2d 741, 752-54 (5th Cir. 1977) (appointment of an ombudsman to act as middleman between prisoners and correctional staff); *Little Rock School District v. Pulaski Co. Special School District No. 1*, 839 F.2d 1296, 1319 (8th Cir.), *cert. denied*, 488 U.S. 869 (1988) (use of a Citizens' Committee as an information-gathering body to monitor the implementation of school desegregation plan). The district court's HSM for Yonkers, however, is not typical in any sense.

The Second Circuit has recognized the appropriate scope of authority to be given a special master and has cautioned against unnecessarily usurping local authority. In *New York State Ass'n for Retarded Children v. Carey*, 706 F.2d 956 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983), the Second Circuit expressed concern that a special master appointed to correct conditions in an institution for the mentally retarded might become a "de facto administrator." *Id.* at 963. However, the court was persuaded that the district court's order "narrowly circumscribed" the duties of the special master and limited his or her role to one of monitoring. *Id.* at 963-64. The order specifically stated that the special master "shall have no authority to exercise control or management over the operation of any facility," but instead would only have the authority to observe and report to the court. *Id.* at 964. The court further noted that the special master was given the power to monitor and to recommend, but was not given the power

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[16] Housing Special Master Marilyn Melkonian and her subordinate staff bill the City at rates ranging from $40 to $200 per hour. Currently, the HSM bills the City at a rate of approximately $20,000 per month.

to decide. *Id.* at 963 n.11. The Second Circuit reasoned that the district court's order did not involve the intrusion and "usurpation" of local authority, concluding that the "powers granted to the Special Master here comport with those granted in similar cases by other courts." *Id.* at 964.

The parties in this case specifically proposed a court-appointed agent charged with monitoring compliance and facilitating implementation. The City proposed the designation of a court-appointed "monitor" to observe, mediate, and report to the court on the progress of implementation. The City's proposal envisioned a process similar to that used successfully on the education side of the Yonkers litigation. J.A. A-3069. The United States and NAACP also called for the appointment of a monitor, agreeing that the use of such an official on the education side of the litigation had been beneficial. J.A. A-3029, 3109.

The power given the court's Housing Special Master exceeds not only what is appropriate under the Constitution, but also exceeds anything proposed by the parties in this case. Under the district court's order, the HSM has primary authority for implementing the housing remedy. The HSM formulates and issues the final Requests for Proposals, selects the preferred developer/builders, recommends those developer/builders to the district court, and notifies the district court of deviations from zoning laws and variances required by the developer/builder. App. A-100-03. The HSM also is assigned the tasks of formulating a revised schedule for future development, developing a small-site new construction program, and reporting to the court regarding FHIO's housing counselling program. App. A-151-54. The order authorizes the HSM to designate third parties to implement the new-construction component of the remedy and the existing-housing component of the remedy.

The district court's order relegates the City to a role of advice and dissent only. The City is given merely the opportunity to make recommendations prior to the Housing Special Master's decisions and to dissent from the Housing Special Master's decisions once they have been submitted to the district court. The City no longer exercises any operational authority over the implementation of the housing remedy. The district court's order

effectively shifts the day-to-day decisionmaking authority from the City to the Special Master.

Both the district court and the Second Circuit have lost sight of the extraordinary nature of the appointment of a housing special master charged with assuming the functions of local government. The Federal Rules of Civil Procedure reserve the appointment of a special master to cases in which there is "a showing that some exceptional condition requires such action." Fed. R. Civ. P. 53(b). More importantly, the same *Milliken* principles that restrain federal courts in fashioning housing remedies restrain federal courts from implementing a remedy that unnecessarily interferes with the structure and function of local government. *See, e.g., Langton v. Johnston*, 928 F.2d 1206 (1st Cir. 1991) (intervention in local government should be conducted "with the clear understanding that the autonomy of these governmental entities should be safeguarded to the maximum extent possible"); *Tillery v. Owens*, 907 F.2d 418, 429 (3d Cir. 1990); *Kendrick v. Bland*, 740 F.2d 432 (6th Cir. 1984); *Park View Heights Corp. v. City of Black Jack*, 605 F.2d 1033 (8th Cir. 1979), *cert. denied*, 445 U.S. 905 (1980) (reversing district court's denial of equitable relief, but cautioning district court on remand to have proper respect for local governmental functions).

It may be appropriate for a federal court to assume the functions of a local governmental institution where the local government is actively obstructing the efforts of the court. *See, e.g., Morgan v. McDonough*, 540 F.2d 527, 530 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977) (affirming the appointment of a temporary receiver for a high school where police were needed to enforce integration); *see also Reed v. Rhodes*, 635 F.2d 556, 558 (6th Cir. 1980) (upholding the use of an administrator where the district court's order convincingly detailed the failure and "inertial nature of the school system"). *Compare Glover v. Johnson*, 855 F.2d 277, 285-86 (6th Cir. 1988) (finding appointment of an administrator to implement educational programs in a women's prison "excessively intrusive" where the record contained no factual findings detailing acts of local officials to show that they had "flouted" the court's orders), *with Glover v. Johnson*, 934 F.2d 703, 713 (6th Cir. 1991) (holding that parties and the district court had developed a sufficient record detailing local obstruction).

There is no such finding of obstruction in this modification proceeding. Quite the contrary, the record demonstrates the City's active participation and cooperation in all aspects of this modification proceeding. In affirming the district court, the Second Circuit noted that the remedial phase of the housing litigation had lasted for eight years. The *modification proceedings*, however, did not begin until 1991, just before a pro-compliance mayor and council were elected in Yonkers. There is no finding in the record of obstruction or delay in the development of a new remedy by the City. In fact, although the district court noted the disharmony between the City and the court-created FHIO, the court specifically refused to attribute blame to any party. App. A-55. During the modification proceedings, the City worked in good faith to develop its alternative housing plan and to identify housing applicants and available housing units. In the absence of a finding of obstruction, the district court exceeded its equitable remedial authority by wresting administrative control of the housing program from the City and vesting that control in yet another court-created entity.

The Second Circuit's decision affirming the district court sets it in direct conflict with other circuits. The Sixth Circuit has expressly rejected the use of a powerful special master to oversee the implementation of a housing remedy. *United States v. City of Parma, Ohio*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982). In *Parma*, the district court found that the City of Parma had resisted fair housing efforts. *Id.* at 568. The district court *sua sponte* appointed a housing special master with detailed responsibilities in administering the remedy. *Id.* at 578. The Sixth Circuit reversed, concluding that the use of a special master was "an extraordinary remedy" and by no means the "least intrusive method" of achieving the court's goals. *Id.* at 579. It found persuasive expert testimony that the implementation efforts would take time and that a chief principle in implementing the plan " 'is that of giving maximum freedom to the local jurisdiction to develop its own solution, to try to not take away the basic rights that inhere in local government to develop its plans for its future growth.' " *Id.* at 578. The Sixth Circuit concluded that the district court would be able, through other means, to oversee implementation of the housing plan. *Id.*

Likewise, the former Fifth Circuit rejected a district court's remedy where the district court exceeded its authority by appointing a 39-member "Human Rights Committee. . . at State expense. . . authorized to employ a fulltime staff consultant, other specialists and a fulltime clerk-stenographer" to monitor implementation of a court order. *Newman v. Alabama*, 559 F.2d 283, 289 (5th Cir. 1977). The Fifth Circuit was particularly frustrated with the unwieldiness of this remedy and suggested the use of a single monitor to observe and report to the court. *Id.* at 289-90; *see also Newman v. Alabama*, 683 F.2d 1312, 1320-21 (11th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983).

The Second Circuit ignores its own admonition "not to use a sledgehammer where a more delicate instrument will suffice." *Dean v. Coughlin*, 804 F.2d 207, 213 (2d Cir. 1986). The Second Circuit has recognized that in institutional reform cases, "the court may be tempted to right the wrong by assuming control of the entire system in which the offensive condition exists and prescribing a new system deemed to meet constitutional requirements," but that courts are usually "ill equipped" to deal with the complexity of institutional administration. *Id.* Here, the district court has assumed control of the entire Yonkers housing program by delegating local authority to an agent of the federal judiciary.

The district court has used a sledgehammer where a more reasonable instrument would have sufficed and has exceeded the scope of the equitable remedial authority given it under the Constitution. Our federal and republican forms of government depend upon both the reservation of plenary powers to the States and the democratic control of public institutions. *See Jenkins*, 495 U.S. at 59 (Kennedy, J., concurring). Issues of local concern and administrative detail are best left to the legislative and administrative decisionmaking of local, public officials accountable to the voters. *See id.; Milliken*, 433 U.S. at 280-81.

The United States District Court for the Southern District of New York is neither local nor legislative. It is a federal court whose constitutional task is to adjudicate cases and controversies and to impose burdens upon the parties before it. *See Jenkins*, 495 U.S. at 66 (Kennedy, J., concurring). No matter how many judicial agencies the court may create, it is still ill-equipped to micromanage the details of the construction and administration of subsidized housing.

Yet, the federal court in this case and its bureaucratic arms now supplant local authority over subsidized housing in Yonkers. The court's bureaucracy formulates requests for proposals, selects developer/builders, develops a small-site new construction program, and otherwise administers the Yonkers housing program. The court has completed its wholesale shift of authority over day-to-day administration of the housing remedy from the local government to the federal judiciary. *See Jenkins*, 495 U.S. at 77.

This Court must reign in the lower courts. The City does not suggest that a monitor (or even a special master) would not be an appropriate means whereby the court could monitor compliance with its orders and facilitate interaction among the parties. That is the mechanism that has been successfully used on the education side of the Yonkers litigation. That is the mechanism that was suggested by both the City and the United States during the modification proceedings. Rather, the City asks this Court to grant this petition and to review the district court's appointment of a Housing Special Master whose administrative powers intrude too far into the function of local government.

CONCLUSION

Petitioner City of Yonkers respectfully requests this Court to grant its petition for writ of certiorari, vacate the orders of the lower courts, and remand this cause for further proceedings.

Dated: September 30, 1994

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1528 August Term, 1993

(Argued: June 13, 1994 Decided: July 5, 1994)

Docket No. 93-6342

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

YONKERS BRANCH – NAACP,

Plaintiff-Intervenor-Appellee,

v.

YONKERS BOARD OF EDUCATION; U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; MARTIN C. BARRELL; JORGE L. BATTISTA; BOARD OF REGENTS OF NEW YORK; SHIRLEY C. BROWN; R. CARLOS CARBALLADA; SALVADORE SCLAFINI; THOMAS SOBOL; LORA BRADLEY CHODOS; STATE OF NEW YORK; THOMAS FREY; WILLARD A. GENRICH; NORMA GLUCK; EMLYN I. GRIFFITH; VINCENT TESE; MIMI LEVENLIEBER; YONKERS COMMUNITY DEVELOPMENT AGENCY; FLOYD S. LINTON; LOUISE P. MATTEONI; JAMES McCABE; EDWARD MEYER; URBAN DEVELOPMENT CORPORATION OF THE STATE OF NEW YORK; SAMUEL R. PIERCE; ADELAIDE L. SANFORD; MARIO CUOMO, as Governor of the State of New York and FLOYD S. LINTON,

Defendants,

v.

CITY OF YONKERS,

Defendant-Appellant.

Before: McLAUGHLIN and JACOBS, *Circuit Judges*, and WEINSTEIN,* *Senior District Judge.*

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* Honorable Jack B. Weinstein, of the United States District Court for the Eastern District of New York, sitting by designation.

The City of Yonkers appeals from a supplemental order entered in the United States District Court for the Southern District of New York (Sand, *J.*) adopting additional measures designed to remedy unconstitutional housing segregation.

AFFIRMED.

RAYMOND P. FITZPATRICK, Jr., Birmingham, AL (R. Scott Clark, Helen Kathryn Downs-Smith, Johnston, Barton, Proctor, Swedlaw & Naff, Birmingham, AL, of counsel), *for Defendant-Appellant.*

JAMES P. TURNER, Acting Assistant Attorney General, Washington, DC (David K. Flynn, Lisa C. Wilson, Department of Justice, Washington, DC, of counsel), *for Plaintiff-Appellee United States.*

MICHAEL H. SUSSMAN, Goshen, NY, *for Plaintiff-Intervenor-Appellee Yonkers Branch — NAACP.*

PER CURIAM:

The City of Yonkers (the "City") appeals from a supplemental order entered in the United States District Court for the Southern District of New York (Leonard B. Sand, *Judge*) adopting additional measures designed to remedy unconstitutional housing segregation. On appeal, the City argues that the district court abused its discretion and violated principles of federalism by (1) rejecting its alternative proposal, and (2) appointing a Housing Special Master.

We affirm.

I

The story of the Yonkers desegregation litigation has been told several times in our prior opinions. *See, e.g., United States v. Yonkers Bd. of Educ.*, 927 F.2d 85 (2d Cir. 1991); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988). We recount only those facts believed necessary to an understanding of this latest chapter.

Following a lengthy bench trial in 1983 and 1984, the district court found that the City unconstitutionally segregated its housing and public schools by relegating virtually all of its subsidized housing to the southwest portion of the City. *See United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985). To remedy the constitutional violation, the court entered the Housing Remedy Order ("HRO"). *See United States v. Yonkers Bd. of Educ.*, 635 F. Supp. 1577 (S.D.N.Y. 1986). Part II of the HRO required the City to establish a Fair Housing Office to administer and implement a fair housing policy. *Id.* at 1577-79. Part VI required the City to develop a long-term plan for the creation of additional subsidized family housing in east or northwest Yonkers. *Id.* at 1582.

In January 1988, the parties negotiated a consent decree in which the City agreed to the creation of 800 units of subsidized housing by 1992. In June 1988, the district court entered the Long Term Plan Order ("LTPO"), setting forth the specific steps the City must take to comply with Part VI of the HRO. The LTPO also expanded the role of the Fair Housing Office, and renamed it the Fair Housing Implementation Office ("FHIO").

The LTPO proved inadequate to the task, however, and all parties agreed that modifications would be necessary to ensure the successful integration of Yonkers. The NAACP, as plaintiff-intervenor, moved in 1991 to require the City to adopt additional remedial measures. The City cross-moved for an order vacating or modifying the consent decree and the LTPO.

At the district court's invitation, the City in 1992 proposed an alternative to the LTPO. The City's plan set a goal of 709 subsidized housing units within four years, using 450 units of existing housing. The district court agreed with the City that converting existing housing was preferable to (and cheaper than) constructing new units, and gave the City eight months to work with the FHIO to demonstrate the feasibility of its alternative plan. Following this demonstration period, the district court held a hearing on the merits of the City's plan.

The district court found that the City's plan to use existing housing "could not realistically achieve even a small percentage of the 450 units it projects." The court also observed that "disharmony" between the City and the FHIO, as well as political pressures exerted on the City, substantially impeded the City's progress. As for the new construction component of the City's plan, the court faulted the plan for its inefficient use of sites and its exclusive reliance on "owner occupied" townhouses.

Based on its findings, the district court entered a modified remedial order, titled the "Supplemental Long Term Plan Order Adopting Additional Remedial Measures" (the "Supplemental LTPO"). For the most part, the Supplemental LTPO rejects the City's plan, and more closely resembles the FHIO's proposal. The Supplemental LTPO adopts a goal of utilizing 250 existing housing units. In addition, the Supplemental LTPO provides for the appointment of a "Housing Special Master" to coordinate and implement the order.

The City now appeals from the Supplemental LTPO.

II

The City argues that the district court abused its discretion by rejecting its alternative plan. The City maintains that a proper respect for principles of federalism required the district court to defer to its plan, as it represented a reasonable, good-faith effort to remedy the constitutional violation. We disagree, particularly in view of the eight years that have elapsed since the HRO was entered.

Once a constitutional violation has been established, "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). The scope of our review of an order designed to remedy a long-standing constitutional violation is accordingly narrow: "The district court, which has 'first hand experience with the parties and is best qualified to deal with the flinty, intractable realities of day-to-day implementation of constitutional commands,' must be given a great deal of flexibility and discretion in choosing the remedy best suited to curing the violation." *Yonkers*, 837 F.2d at 1236 (quoting *United States v. Paradise*, 480 U.S. 149, 184 (1987) (internal quotation marks and citation omitted)).

Without question, "one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions." *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990). And, we readily agree with the City that "local authorities have the 'primary responsibility for elucidating, assessing and solving' the problems of desegregation." *Jenkins*, 494 U.S. at 51 (quoting *Brown v. Board of Educ.*, 349 U.S. 294, 299 (1955)). Contrary to the City's argument, however, a proper respect for the principles of federalism does not require a court to adopt wholesale the local government's choice of remedies.

When a constitutional violation has been established, the defendant does not shoulder its burden at the remedy stage merely by coming forward with a plan. The defendant must "come forward with a plan that promises realistically to work, and promises realistically to work *now*." *Green v. County Sch. Bd. of New Kent County, Va.*, 391 U.S. 430, 439 (1968) (emphasis in original). The district court has not only the power but the duty to ensure that the defendant's proposal represents the most effective means of achieving desegregation. *See id.; see also Paradise*, 480 U.S. at 183. Thus, when the City proposed its alternative plan to desegregate Yonkers, the district court was under a duty to "weigh that claim in light of the facts at hand and in

light of any alternatives which may be shown as feasible and more promising in their effectiveness." *Green*, 391 U.S. at 439. Accordingly, the district court did not abuse its discretion by rejecting those aspects of the City's plan it found ineffectual.

Nor can the City seriously maintain that it was excluded from the process of formulating the Supplemental LTPO. The district court invited the City's alternative proposal, gave the City eight months to demonstrate its feasibility, and held a ten-day hearing on its merits. In fashioning the remedy, the court retained those aspects of the City's plan it found realistic and effective, and jettisoned those it found unrealistic and unfeasible. This was a proper exercise of its authority. *Cf. Dean v. Coughlin*, 804 F.2d 207 (2d Cir. 1986) (remedial order vacated where the district court adopted the plaintiffs' detailed and intrusive remedial plan without adequately considering the defendants' proposal).

III

The City also argues that the district court overstepped its constitutional authority by appointing the Housing Special Master to implement the Supplemental LTPO. Again, we disagree.

The power of the federal courts to appoint special masters to monitor compliance with their remedial orders is well established. *See, e.g., New York State Ass'n for Retarded Children v. Carey*, 706 F.2d 956, 962-65 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983); *Stone v. City & County of San Francisco*, 968 F.2d 850, 859 n.18 (9th Cir. 1992) (collecting cases), *cert. denied*, 113 S. Ct. 1050 (1993). Obviously, a special master vested with authority to implement a court's order poses a greater threat of intrusion than one whose authority is limited to monitoring compliance with that order. *See, e.g., United States v. City of Parma*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982). Nevertheless, as with any other remedial tool, the grant of administrative authority to a master does not amount to an abuse of the court's broad discretion if the authority conferred is tailored to cure the constitutional violation. *See, e.g., Glover v. Johnson*, 934 F.2d 703, 713 (6th Cir. 1991) (upholding appointment of administrator).

We are not persuaded that the master's administrative authority is unjustified, or that a less intrusive method would suffice. The remedial phase of this litigation has now dragged on for eight years, producing few tangible results. The district judge, who has lived with this case since its inception, expressed understandable frustration with the cost and delay occasioned by the City's efforts to implement the court's prior remedial orders, most recently demonstrated by the City's failure to work effectively with the FHIO. The district court has fairly concluded that a "system which relies on consensus and mediation" has proven unreliable and ineffectual to integrate Yonkers. We see no basis to disturb his conclusion that effective desegregation requires a more centralized control in a single individual immune to the political pressures which have compromised the City's most recent efforts at compliance.

Finally, contrary to the City's characterization, the City is not removed from the day-to-day implementation of the order. The Supplemental LTPO requires the Housing Special Master to work together with the City. When disagreements arise, the Housing Special master's decision will control, but the City has the right to appeal adverse decisions to the district court. This is not a dramatic change from the prior system, under which the City was required to work with the FHIO, a court-appointed agency, with the district court retaining the final word.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

Plaintiff, 80 CIV 6761 (LBS)

-and-

YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Plaintiffs-Intervenors, HOUSING REMEDY ORDER

-against-

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

----------X

CITY OF YONKERS and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Third-Party Plaintiffs,

-against-

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, and SECRETARY OF HOUSING AND URBAN DEVELOPMENT,

Third-Party Defendants.

----------X

APPEARANCES: (See next page) May 28, 1986

HONORABLE LEONARD B. SAND, U.S.D.J.

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SAND, J.

Pursuant to this Court's liability findings of November 20, 1985, the evidence adduced at the remedial hearing, the supplemental findings set forth in the Opinion filed this date and the subsequent written submissions and oral arguments of the parties, the Court enters the following Order.

I. Injunction

The City of Yonkers, its officers, agents, employees, successors and all persons in active concert or participation with any of them, are permanently enjoined from:

A. blocking or limiting the availability of public or subsidized housing in east or northwest Yonkers on the basis of race or national origin;

B. confining public or subsidized housing to southwest Yonkers on the basis of race or national origin;

C. otherwise intentionally promoting racial residential segregation in Yonkers;

D. interfering with any person who is exercising or attempting to exercise his or her rights to equal housing opportunities;

E. taking any action intended to deny or make unavailable housing to any person on account of race or national origin, or

F. impeding or interfering with the successful implementation of the school desegregation remedy.

II. Fair Housing Resolution and Office

It is further ordered that the City shall take the actions described below to implement a fair housing program.

A. Within 30 days of the date of this Order, the City shall adopt a Resolution of the City Council setting forth the fair housing policy of the City of Yonkers: to assure equal housing opportunities and nondiscrimination in the provision of housing throughout the entire City.

B. Within 60 days of the date of this Order, the City shall adopt a Resolution of the City Council establishing a Fair Housing Office (FHO). The FHO shall have the general responsibility to administer and implement the fair housing policy of the City and shall have the specific responsibilities described below. The City shall provide for adequate funding of the FHO throughout the life of this Order to ensure that it may fully carry out its responsibilities. The FHO shall establish a principal office and auxiliary offices as needed. The FHO shall publicize and promote the services it offers.

C. The FHO shall be headed by an Executive Director. The City shall provide funds for sufficient staff to carry out all of the FHO's responsibilities under this Order. Staff shall be hired by the Executive Director.

D. Within 30 days after passage of the FHO Resolution, the City shall submit to the United States and plaintiffs-intervenors the names and qualifications of not less than three candidates for Executive Director. Within 15 days thereafter, the United States and plaintiffs-intervenors shall respond to the City, indicating which, if any, of the candidates are acceptable. The City Manager shall, within 15 days of these responses, appoint a candidate from among those approved by both the United States and plaintiffs-intervenors. If the United States and plaintiffs-intervenors do not agree on the acceptability of any of the City's candidates, they shall include in their responses to the City the names of two or more candidates of whom they approve. If the City Manager finds none of these alternative candidates acceptable, this Court shall make the selection from among all those suggested by the parties. If the position of Executive Director becomes vacant during the life of the decree, the same procedure shall be followed in making subsequent appointments with time periods adjusted so that the position does not stay vacant for longer than 60 days.

E. In order for the other parties effectively to monitor the City's compliance with its obligations under this Order, the FHO shall submit to the City Manager and the United States and plaintiffs-intervenors each year during the life of this Order a proposed plan of activities and programs for the following year. The first such plan shall be submitted within 60 days of the appointment of an Executive Director. The United States and plaintiffs-intervenors shall have 30 days to make suggestions and comment on the plan before it is adopted by the City Manager. The City Manager must adopt a plan within 60 days of its submission.

The FHO shall also, on a semi-annual basis, report to the United States and the plaintiffs-intervenors on its activities for the period, including any difficulties encountered in carrying out its responsibilities under this Order. The FHO shall maintain detailed records of its activities and, upon reasonable notice, shall make these records available to the United States or plaintiffs-intervenors for review.

F. The FHO shall have the functions and responsibilities as set forth below:

1. On an ongoing basis, the FHO shall review the activities of City agencies and offices for compliance with the fair housing policy of the City and the terms of this Order. The FHO shall, as it deems appropriate, make recommendations to such enities for actions to be taken to ensure compliance with the fair housing policy and this Order. In its reports to the United States and plaintiffs-intervenors, the FHO shall include full information about its reviews of City agencies' activities, any recommendations made by the FHO and any agency action taken in response to such recommendations.

2. The FHO shall conduct educational programs for City and School District personnel, as well as for the community at large, to explain the City's fair housing policy and its enforcement efforts and obligations under this Order. Such programs should be designed to elicit support for the remedial efforts of the City and the Board of Education and to promote racial harmony in Yonkers. The FHO shall coordinate with the School Board the development and presentation of programs explaining fair housing policy to City school children. These educational programs shall be initiated as soon as possible (and, in no event, more than 60 days) after the appointment of an Executive Director. To the extent appropriate and feasible, the FHO shall make use of the services and experience of private and public organizations which have developed programs to aid communities experiencing desegregation.

3. The FHO shall collect information relating to housing needs and services, identify available rental and sales units within the City and provide information to homeseekers seeking housing on a nondiscriminatory basis and inform them of the availability

of rental management companies, brokers, local lending institutions and agents. To assist the FHO in the gathering of this and any other relative information, the FHO shall have the right and authority to issue subpoenas which shall be enforceable by this Court. The FHO shall perform all of its functions on a continuing and nondiscriminatory basis throughout the life of this Order. The FHO shall ensure that all persons who request its assistance in obtaining housing are made aware of housing opportunities in all areas of the City. The FHO shall in particular make such information available to all persons in the City receiving Section 8 certificates who seek its services and the Municipal Housing Authority (MHA) shall inform persons obtaining certificates from that agency of the services available through the FHO.

4. The FHO shall offer training concerning fair housing practices for persons in the housing rental and sales business. In addition, the FHO shall require and conduct training concerning fair housing practices for all persons responsible for the management or marketing of housing currently receiving City assistance or housing developed pursuant to the Order.

5. The FHO shall ensure that all housing made available pursuant to the operation of this Order, and all housing otherwise receiving City, state or federal assistance, including housing in the southwest quadrant, be affirmatively marketed either through the FHO's own efforts or by review, approval and monitoring of the affirmative marketing plans of persons providing such housing. These efforts shall be designed to ensure that such housing is made available to all persons regardless of race or national origin and to ensure that persons who, based on past experience, have been least likely to occupy housing in a particular area of the City are fully informed of all housing opportunities there. The affirmative marketing plans

shall be consistent with the occupancy priorities provisions (¶ VII) of this Order.

6. The FHO shall coordinate with appropriate personnel from the Yonkers Board of Education to ensure that demographic data, school enrollment data, plans for housing and school program development and other information relevant to the remedial process is available to both the Board and the City.

7. In providing information about available housing resources to persons seeking such information, the FHO also shall inform such persons of their rights to equal housing opportunities under the City's fair housing policy, state law and the Federal Fair Housing Act of 1968. The FHO shall alert persons seeking housing that a refusal to rent or sell on account of race or national origin or the imposition of different terms and conditions of rental or sale on account of race or national origin, is against the law, and shall encourage such persons to immediately report any suspected discrimination to the FHO. The FHO shall refer persons who wish to file complaints concerning suspected discrimination to, as appropriate, the Yonkers Commission on Human Rights, HUD, the New York Division of Human Rights, and the United States Department of Justice, and shall inform them of other assistance available through private nonprofit agencies. The FHO shall assist complainants in communicating with the appropriate agencies and shall cooperate with such private and governmental agencies in their activities. The FHO shall not conduct or intervene in litigation proceedings except proceedings to enforce subpoenas issued pursuant to paragraph 3 hereof.

III. Transfer of Section 8 Administration

It is further ordered that the City shall, within 60 days of the date of this Order, seek HUD approval to transfer administration of its Section 8 existing program to the Yonkers Municipal Housing Authority (MHA). The FHO shall cooperate with the MHA in assisting certificate holders to obtain housing in all areas of the City on a nondiscriminatory basis and shall report on its own and the MHA's actions in this regard. HUD shall advise the Court and the parties within 30 days after such application whether it has approved the transfer, and if not, its reasons for such disapproval.

IV. Public Housing Units

The City has previously committed itself to provide acceptable sites for 200 units of public housing as a condition for receiving its 1983 Community Development Block Grant ("CDBG") funds but has failed to do so. Pursuant to the 1984 HUD-NAACP Consent Order entered by this Court, HUD agreed to fund 200 units of public housing east of the Saw Mill River Parkway. The Consent Order provided that HUD would initiate procedures to reduce funding of the City's 1984-85 CDBG entitlement grant up to its full amount unless the City submitted to HUD for preapproval sites for at least 140 of the 200 units. But for the terms of this Order, HUD's authority to commit the 1984-85 CDBG funds would expire on September 30, 1986 (funds for the grant were appropriated in 1983 and "remain available until September 30, 1986." P.L. 98-45, 97 Stat. 223, July 12, 1983). HUD shall obligate the funds prior to the expiration of the funding authority in September if either (a) the City submits an acceptable Housing Assistance Plan (HAP) and other documentation as required by 24 C.F.R. § 570.302 prior to that expiration, or (b) such HAP and documentation are deemed submitted as herein provided. If the City submits all requisite documents, HUD shall obligate the funds, but make their availability conditional on the City submitting acceptable sites in East Yonkers for development of 140 units of public housing. (The Court finds such action would be consistent with HUD's obligations under paragraph 6.B. of the March 19, 1984

Consent Decree with the NAACP). The City would accept this condition by execution of a grant agreement containing the condition. Because, but for the terms of this Order HUD could not obligate the funds until the City submits all necessary documents, the City if hereby ordered to submit the required documents and execute the conditional grant agreement prior to the expiration of the funding authority, and to make timely submission of acceptable sites.

A. Accordingly, it is ordered that the City shall, within fifteen (15) days of the date of this Order, submit to HUD an acceptable HAP for the 1984-85 program year and other documentation required by 24 C.F.R. § 570.302. HUD shall advise within ten (10) days thereafter if the HAP and other documentation is acceptable. If the City fails to submit an acceptable HAP and other documentation as heretofore provided, plaintiff and plaintiffs-intervenors shall submit same to the Court and to HUD within the next five (5) days, and upon approval by this Court, said submission shall be deemed to be the HAP for the City of Yonkers for the 1984-85 program year and to have satisfied any and all HUD regulations and relevant statutes requiring such HAP.

B. It is further ordered that the City shall, within fifteen (15) days of the date of this Order, execute a grant agreement with HUD for the 1984-85 program year, with the condition that receipt of the grant depends on submission of acceptable sites for 140 units of family public housing. If the City fails to execute such grant agreement within fifteen (15) days from the date of this Order, plaintiff and plaintiffs-intervenors shall submit such an agreement to the Court and to HUD within the next ten (10) days, which grant agreement, upon approval by the Court, will be deemed to have been executed by Yonkers and to have satisfied any and all relevant statutes and HUD regulations requiring such agreement.

C. It is further ordered that the City shall within thirty (30) days of the date of this Order, submit to HUD for preapproval at least two sites for 140 units of family public housing, along with the necessary supporting documentation. HUD shall advise

within fifteen (15) days thereafter whether the sites so submitted are approved. If the City fails to designate approved sites within the time periods set forth herein, and only if the City fails to make such designation, then the City will be deemed to have submitted as said sites such combination of the following sites *and* any other available sites as plaintiff and plaintiffs-intervenors shall designate and the Court shall approve:

(a) School 4. This site may be used for rehabilitation of the existing school building and new construction on that site, or new construction on the black top area, or some combination thereof;

(b) School 15 and the Walt Whitman School. If this provision becomes operative by virtue of the failure of the City to designate alternative sites, the School Board is hereby ordered to return the Whitman site to the City. The School Board may, if it wishes, reserve to itself rights to occupy such space on the Whitman site as shall be reasonably necessary and appropriate for teacher training and library storage facilities (the only uses for Whitman presently envisioned by the School Board).

Nonassisted units may also be placed on the aforesaid sites together with assisted units (*e.g.*, in an 80/20 ratio) provided that the total number of assisted units resulting from all site designations is 140 units.

D. It is further ordered that, within ninety (90) days of the date of this Order, the City shall submit sites to HUD, with all the necessary supporting documentation for the remaining 60 units of public housing committed by HUD pursuant to the 1984 Consent Order, which sites shall (unless otherwise authorized by the Court) be selected from a list contained in Exh-NAACP RH-16 (6 available privately-owned sites listed by the Yonkers Planning Director as suitable for development of public housing). Provided, however, that no privately owned sites from this list shall be submitted unless such submission is accompanied by either (a) an agreement of sale or assignable option between the MHA and the owner of the property or (b) a written agreement between the MHA and the owner under which the owner (or

developer with an option that provides control) of the site agrees, if selected pursuant to the MHA's request for Turnkey proposals, to develop on a Turnkey basis a specified number of public housing units. The public housing units may themselves constitute the total development of the site or be a part of a larger (public/private) development on the site. The owner (or developer with an option that provides control) of the site must also agree to make the site available to the developer whose Turnkey proposal is selected should the proposal by the owner (or developer with an option that provides control) not be selected as a result of the MHA's request for Turnkey proposals.

E. It is further ordered that within ninety (90) days of site preapproval for the 140 units, the City shall cause the MHA to submit site development proposals, pursuant to 24 C.F.R. § 941.404, for the preapproved sites. If the City shall fail to submit site development proposals within the said time period, the plaintiff and plaintiffs-intervenors shall submit same to the Court and to HUD, which, upon approval by the Court, shall satisfy any and all statutory or regulatory requirements in the manner heretofore provided.

F. If Yonkers shall not comply with the directions contained in this Order so that the obligations which are its primary responsibility to designate sites and provide the necessary documentation for the development of the housing units referred to herein devolve on the plaintiffs and plaintiffs-intervenors, the Court may appoint a person expert in such matters to assist the Court and the parties in the preparation of the materials required pursuant to this Order, whose reasonable compensation shall be paid by Yonkers.

V. Affordable Housing Trust Fund

The City shall create an Affordable Housing Trust Fund to be administered by the Fair Housing Office in cooperation with HUD and the MHA. The City will initially fund the trust with not less than 25 percent of the CDBG funds presently allocated by HUD to the City which minimum funding level may be diminished by 5 percent in each of the three succeeding years.

In addition, the City will use its best efforts to secure additional funding for the trust fund from other governmental and private sources.

1. These funds will be used to foster the private development of low and moderate income housing by developers who will include 10 percent to 20 percent low and moderate income housing in their proposed development by providing the following incentives:

(i) write down of the site price of City-owned land;

(ii) finance surveys, market analyses and other similar pre-construction costs;

(iii) finance site infrastructure improvements such as sewers;

(iv) interim construction loan financing at below market interest rates;

(v) rental and/or mortgage subsidies to low and moderate income households in such developments; and

(vi) funds to low and moderate income families for rehabilitation.

2. Housing developments will be chosen by the Fair Housing Office to receive trust fund aid in order to advance racial and economic integration.

VI. Plan for Development of Additional Subsidized Housing

The City shall develop a Plan for the creation of additional subsidized family housing units (beyond the 200 units provided for in IV, *supra*) in existing residential areas in east or northwest Yonkers. In such Plan, the City shall be free to provide for the utilization of such private and public funding resources as are available to it including the Affordable Housing Trust Fund.

The Plan may provide for units of subsidized housing to be part of a larger development including market rate housing in such ratio (*e.g.*, 80 percent market rate; 20 percent subsidized) as shall be appropriate for the site and proposed development. The City may also provide such units by requiring private developers to construct units of subsidized housing as a condition to obtaining variances or zoning changes, which subsidized units may be on the site in question or on another acceptable site or sites. The City may also provide in its Plan for the purchase and/or lease by MHA of available units in existing private condominiums, co-operatives or rental buildings throughout Yonkers. However, before such units may be included in the Plan, the City must have obtained realistic assurances that the units will in fact be available for this purpose (*e.g.*, the willingness of the seller; approval of co-operative board, if required; acceptable price, etc.). The City shall furnish to the Court and the parties a detailed statement of this Plan by November 15, 1986, which Plan shall contain the following:

(a) number of subsidized units proposed for construction or acquisition;

(b) location of such sites;

(c) rent levels or degree of subsidization;

(d) marketing or rent-up plans;

(e) such other information as shall be necessary or appropriate to enable evaluation of the feasibility of the Plan and the extent to which the construction or acquisition of the units in question will further the integrative goals of this Order.

The parties shall have thirty (30) days thereafter to comment on said Plan, after which time the Court may schedule a hearing to determine its adequacy in light of the violations and needs found to exist. In the event that the Plan shall be found to be inadequate, the Court reserves all of its rights and powers to make such modifications in the Plan or require such additional action by the City as the circumstances shall warrant.

VII. Occupancy Priorities

A. Public Housing

The first priority for occupancy of public housing units made available in east Yonkers shall be given to eligible persons on the existing waiting list for such housing. The second priority for these units shall be given to families now living in southwest Yonkers who have school age children whose attendance at Yonkers public schools will further the integrative objectives of this Court's School Desegregation Order of May 14, 1986.

B. All Other Units

The first priority for occupancy of all other units made available pursuant to this Order in east Yonkers shall be given to families now living in southwest Yonkers who have school age children whose attendance at Yonkers public schools will further the integrative objectives of the School Desegregation Order of May 14, 1986.

C. It is anticipated that the City will continue and accelerate its efforts to rehabilitate substandard housing throughout the City, although rehabilitation efforts in southwest Yonkers will not relieve the City from its other obligations hereunder. The first priority for occupancy of rehabilitated units in southwest Yonkers shall be given to eligible families living in east Yonkers who have school age children whose attendance at Yonkers public schools will further the integrative objectives of the School Desegregation Order of May 14, 1986.

The first priority for occupancy of rehabilitated units in east Yonkers shall be given to eligible families living in southwest Yonkers who have school age children whose attendance at Yonkers public schools will further the integrative objectives of the School Desegregation Order of May 14, 1986.

VIII. City to Seek Available Financing

The City shall submit timely and complete applications for CDBG entitlement funds for each program year during the pendency of this Order, including appropriately prepared Housing Assistance Plans, and assurances of compliance with all conditions placed on receipt of such funds. The City shall seek all other available forms of financial assistance from both public and private sources which are currently available or which become available during the pendency of this Order.

IX. Notice

The City shall not grant any zoning change or variance or issue a building permit to any private developer with respect to any of the sites referred to in this Order or listed on Exh-NAACP R.H. 16 without furnishing twenty (20) days prior written notice to the United States, the plaintiffs-intervenors and the Court.

X. Funding

The City shall provide funding for all of the measures set forth herein. The City shall also provide funding for all of the school desegregation measures required by this Court's Order of May 14, 1986.

The City and its agencies responsible for implementing the remedial Order shall maintain records of all actions taken pursuant to the Order. All such records shall be made available for review by the United States and plaintiffs-intervenors upon reasonable notice.

XI. Jurisdiction

This Court shall retain jurisdiction of this matter for five years. At the end of that period, the City may move for the dismissal of this case. Dismissal shall be granted unless, within thirty days from receipt of that motion, the United States or plaintiffs-intervenors object to the dismissal. If such an objection is made

with sufficient particularity, the Court shall hold a hearing on the dismissal motion, and the objecting party shall have the burden to demonstrate why the motion should not be granted. If the objecting party fails to carry its burden, the case shall be dismissed with prejudice.

SO ORDERED.

Dated: New York, New York
May 28, 1986

/s/ Leonard B. Sand
U.S.D.J.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, and YONKERS BRANCH-N.A.A.C.P, *et al.*, Plaintiffs-Intervenors, v. YONKERS BOARD OF EDUCATION, *et al.*, Defendants.	80 CIV 6761 (LBS) Modification to Housing Remedy Order dated May 28, 1986

Pursuant to my order of June 26, 1986, denying the Motion by the United States Department of Housing and Urban Development for Amendment of the Housing Remedy Order as to Paragraph 1 and granting the Motion as to Paragraphs 2, 3, and 4, the Housing Remedy Order of May 28, 1986 is hereby modified as follows:

1. Paragraph V. shall be amended to read:

> The City shall create an Affordable Housing Trust Fund to be administered by the Fair Housing Office in cooperation with HUD and the MHA. The City will initially fund the trust with not less than 25 percent of the CDBG funds allocated to the City in program years 1984-85, 1985-86, and 1986-87, which minimum funding level may be diminished by 5 percent per year in each of the succeeding years of this decree. . . .

1. These funds will be used to foster the private development of low and moderate income housing by developers who will include at least 20 percent low and moderate income housing in their proposed developments, provided that the portion of the total development cost of each building that is borne by CDBG funds be no greater than the percentage of units in the project that will be occupied by low and moderate income persons, by providing the following incentives. . . .

2. Paragraph IV.B. shall be amended to read:

It is further ordered that within fifteen (15) days of the date that HUD approves the City's HAP, the City shall execute a grant agreement with HUD for the 1984-85 program year, with the condition that receipt of the grant depends on submission of acceptable sites for 140 units of family public housing. If the City fails to execute such grant agreement within fifteen (15) days of the approval of the HAP, plaintiff and plaintiffs-intervenors shall submit such an agreement to the Court and to HUD within the next ten (10) days, which grant agreement, upon approval of the Court, will be deemed to have been executed by Yonkers and to have satisfied any and all relevant statutes and HUD regulations requiring such agreement.

Based on notification of an inconsistency by counsel for Yonkers, Paragraph IV.A. of the Housing Remedy Order is also modified as follows:

Accordingly, it is ordered that the City shall, within fifteen (15) days of the date of this Order, submit to HUD an acceptable HAP for the 1986-88 program years and other documentation required by 24 C.F.R. § 570.302. HUD shall advise within ten (10) days thereafter if the HAP and other documentation is acceptable. If the City fails to submit an acceptable HAP

and other documentation as heretofore provided, plaintiff and plaintiffs-intervenors shall submit same to the Court and to HUD within the next five (5) days, and upon approval by this Court, said submission shall be deemed to be the HAP for the City of Yonkers for the 1986-88 program years and to have satisfied any and all HUD regulations and relevant statutes requiring such HAP.

SO ORDERED.

Dated: New York, New York
July 9, 1986

/s/ Leonard B. Sand
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, - and - YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *ET AL.*, Plaintiff-Intervenor, - against - YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY, Defendants.	80 CIV 6761 (LBS)

FIRST REMEDIAL CONSENT DECREE IN EQUITY

The following sets forth certain agreements of the parties to this litigation, and certain actions which the City of Yonkers (the "City") will take in connection with a consensual implementation of Parts IV and VI of this Court's Housing Remedy Order (the "HRO") entered on May 26, 1986. Accordingly, the parties agree as follows:

Public Housing

SECTION 1. The City acknowledges its continuing commitment to the construction of the 200 units of public housing

made available by the United States Department of Housing and Urban Development ("HUD") pursuant to the consent decree of March 19, 1984 between HUD and plaintiff-intervenor.

SECTION 2. The City agrees to provide the sites referred to below in this Section under the caption "Sites" for the location of a total of 200 units of public housing referred to in Section 1. The number of such units to be located on each site is not to exceed the number set forth under the caption "Maximum Density" opposite each site.

Sites	*Maximum Density*
Whitman School (north-west field)	40
Lincoln School (lower field)	48*
School 4	24
Helena Avenue	22
Wrexham Road	30
Clark Street	20
Valentine Street	16

SECTION 3. (a) The City shall have the right to submit no later than ten days after the date of this decree a maximum of two additional sites acceptable to HUD to be used for the location of a portion of the 200 units of Public Housing referred to in Section 1.

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* If HUD does not approve this proposed density for the Lincoln School site, the densities at other approved sites will be appropriately adjusted.

(b) If the City avails itself of the right to submit additional sites as set forth in paragraph (a), the City shall also submit to the Court a proposed amendment to Section 2 hereof, setting forth an expanded list of sites and their respective "Maximum Densities", provided that the Maximum Density of no site shall be fewer than 12 units.

(c) Upon approval by the Court, the proposed amendment to Section 2 shall have the same effect as if fully set forth herein at this time.

(d) The City acknowledges and understands that, if no additional sites are proposed by it and approved by the Court, the 200 units of public housing shall be located on the sites and in the densities currently set forth in Section 2.

SECTION 4. On or before the later of fifteen days from (i) the date of this decree or (ii) the date of any approval by the Court of an amended Section 2 (as contemplated by Section 3(c) hereof), the City shall make (or shall cause to be made) fair market value offers to purchase from their respective owners such private sites as are set forth in Section 2 (as theretofore amended). Such offers shall also advise the respective owners that, in the absence of a voluntary agreement for the purchase by (or on behalf of) the City, the City will commence (or will cause to be commenced) legal proceedings to secure control over the relevant site in the most expeditious manner, including the use of the power of eminent domain.

SECTION 5. On or before 60 days of the date of this decree, the City will have (i) concluded negotiations with, and will have acquired title from, owners of private sites willing to sell their respective properties to the City on mutually agreed upon terms or (ii) commenced eminent domain proceedings against owners of private sites who have been theretofore unwilling voluntarily to sell their respective properties.

SECTION 6. On or before 80 days from the date of this decree, the City shall have caused the Municipal Housing Authority

("MHA") to prepare a request for proposals ("RFP") from developers for the construction of 200 units of Public Housing to be located as provided in Section 2. The parties agree that they will cooperate in good faith with each other, the MHA and HUD to insure that the preliminary steps in the preparation of a final RFP (including (i) the preparation of preliminary site reports for all sites (which shall be prepared at the City's expense subject to reimbursement from HUD, if HUD approves the development proposal), (ii) the subsequent review of such site reports by HUD, (iii) any conferences required to agree on appropriate language for the RFP, and (iv) the drafting of the final RFP) can be completed within the time limitation set forth in this Section.

SECTION 7. (a) On or before the later of (i) 10 days after having acquired site control over all the sites referred to in Section 2 or (ii) the time limitation set forth in Section 6, the City shall cause the MHA to publish at the City's expense the RFP referred to in Section 6 in a manner reasonably calculated to insure that the RFP is broadly disseminated to developers doing business in the Yonkers area. The methods of publication shall include (without limitation) advertisements in *The New York Times* and another newspaper of general circulation in the Yonkers area, direct mailings to specific developers, and periodic advertisements in no fewer than two trade magazines identified by the OHA, and shall otherwise conform to HUD Handbook 7417.1 REV-1 (October 1980) ¶ 6-39(b).

(b) The publication referred to in paragraph (a) shall be made at least once each week for two consecutive weeks.

SECTION 8. The review of developers' proposals shall begin 55 days after the date on which the RFP is first published. The MHA shall complete such review within 20 days and submit its selection to HUD immediately thereafter for HUD's review according to HUD's procedures. Construction shall begin as

promptly as practicable following HUD's approval of the development proposal.*

SECTION 9. The City will fully and in good faith cooperate with all persons, parties, and organizations the involvement of which is necessary or desirable for the completion of the process contemplated hereinabove.

SECTION 10. The City agrees that, to the extent it relates to the City's obligation to provide sites for the placement of 200 units of public housing, it will seek no further appellate review of the decision of this Court entitled *United States of America et al. v. Yonkers Board of Education et al.*, 624 F.Supp. 1276 (S.D.N.Y. 1985) or of any subsequently entered decree. The City acknowledges that if any subsequent appellate ruling (whether such ruling had been prosecuted by the City or any other party to this litigation) were to nullify or in any way weaken the constitutional or statutory basis of the City's obligation to provide such sites (as found by the Court in the opinion above), the City would, nevertheless, be required by this Decree on Consent fully to discharge such obligations as set forth herein.

SECTION 11. The parties acknowledge that HUD has not heretofore given its final approval for the sites and densities set forth in Section 2 or for any final development plans for such sites and that, in accordance with the Consent Decree dated March 19, 1984, HUD may disapprove specific proposals that fail to meet applicable standards for approval.

Assisted Housing

SECTION 12. The City acknowledges that a long-term goal (the "Goal") of 800 units of assisted housing (the "Units") is an appropriate target in fulfilling its obligations pursuant to Part

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* The parties acknowledge that HUD's processing time for such approval is 50 days. The parties understand that HUD will expedite the approval process if possible.

VI of the HRO. The City will, subject to the terms hereof, make good faith efforts to take such steps as are required to achieve said Goal on or before June 30, 1992 and to achieve benchmarks of 200, 400, and 600 Units on or before the first, second, and third anniversaries, respectively, of the adoption of Mandated Incentives (as contemplated in Section 17).

SECTION 13. (a) There shall be a presumption in favor of allowing two years for the Mandated Incentives to demonstrate their effectiveness in fostering the development of a sufficient number of Units timely to achieve the Goal without the adoption of additional remedial measures.

(b) Notwithstanding paragraph (a), after the first anniversary of the adoption of Mandated Incentives, plaintiff or plaintiff-intervenor may move the Court for an order directing the City to take additional remedial measures if the movant satisfies the burden of overcoming the presumption referred to in paragraph (a) by clear and convincing evidence that the Mandated Incentives are insufficient timely to achieve the Goal.

(c) If, on or after the second anniversary of the adoption of Mandated Incentives (or at such earlier date as provided in paragraph (b)), the 400-Unit benchmark referred to in Section 12 has not been met, the plaintiff or the plaintiff-intervenor may apply to this Court for an order requiring the City to adopt additional or substituted remedial measures to insure that the Goal will be timely met.

(d) The City acknowledges that the additional or substituted remedial measures which the Court may require it to adopt as provided herein may include the requirement that the City issue (or cause to be issued) RFPs for the construction of multi-family housing (to include Units) on city-owned land. The City acknowledges further that it would be within the power and jurisdiction of the Court to require such use of city-owned land.

SECTION 14. The parties agree that the Units shall be provided only in conjunction with, or as a part of, housing

developments containing units to be offered for sale or rental at market rates.

SECTION 15. The parties agree that, pursuant to Section 12, no fewer than (a) 100 Units shall be provided on terms affordable to families earning no more than 50 percent of the median income in the New York Metropolitan Area; (b) 300 Units shall be provided on terms affordable to families earning no more than 80 percent of the median income in such Area; (c) 300 Units shall be provided on terms affordable to families earning no more than 100 percent of the median income in such Area; and (d) 100 Units shall be provided on terms affordable to families earning no more than 120 percent of the median income in such Area.

SECTION 16. This decree shall impose on the City no obligation with respect to city-owned property, except as contemplated by Sections 2 and 13 and previously issued orders of this Court.

SECTION 17. The City agrees to adopt, among other things, legislation (a) conditioning the construction of all multi-family housing (inclusive of projects for future construction currently in the planning stage but which will require zoning changes, variances, special exceptions, or other discretionary approvals from the City to begin construction) on the inclusion of at least 20 percent assisted units; (b) granting necessary tax abatements to housing developments constructed under the terms of the legislation referred to in clause (a); (c) granting density bonuses to such developers; (d) providing for zoning changes to allow the placement of such developments, provided, however, that such changes are not substantially inconsistent with the character of the area; and (e) other provisions upon which the parties may subsequently agree (including the use of the Industrial Development Authority as a development vehicle and the creation of a municipally-designated, independent not-for-profit Local Development Corporation) (collectively, the "Mandated Incentives"). The City agrees to implement a package of Mandated Incentives as promptly as practicable but, in no event, later than 90 days after the entry of this decree.

SECTION 18. (a) The parties acknowledge that certain issues remain to be agreed upon. These issues include, without limitation, the appropriate percentage configuration (as between assisted- and market-rate units) of the relevant housing developments; the appropriate share of Units devoted to rental or to ownership; the appropriate resale limitations for Units allocated to ownership; the implementation of other financial mechanisms to facilitate the provision of Units or to make them more widely affordable; the appropriate disposition of such funds as are deposited in the AHTF; the steps which the City may take to make the use of "section 8 certificates" more widely available; and the possibility of a reduction in the Units to be made available at prices affordable by the income groups referred to in clauses (b) and (c) of Section 15 if the City were to secure the placement of units of assisted housing in certain housing developments currently under consideration in the City.

(b) The parties agree that they will work diligently to agree on such subsidiary issues and submit to the Court on or before February 15, 1988 a Second Remedial Consent Decree setting forth any understandings with respect to such matters.

SECTION 19. If in the view of any party there exists a problem or obstacle to the full or timely implementation of this decree, any party may bring such issue before this Court for resolution.

SECTION 20. Plaintiff-intervenor or the City may assert before this Court such rights it may have to challenge the discretionary decisions which HUD may make in making available the 200 units of public housing which are the subject of this decree, including any decision not to waive the Total Development Cost cap.

Dated: January 25, 1988

Plaintiff,
The United States of America

By: /s/Brian Heffernan
Brian Heffernan, Esq.

Civil Rights Division
U.S. Department of Justice
10th & Pennsylvania Aves., N.W.
Washington, D.C. 20535

Attorneys for Plaintiff

Plaintiff-Intervenor,
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Defendants,
The City of Yonkers and Yonkers Community Development Agency

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Attorneys for Defendants
The City of Yonkers and
Yonkers Community
Development Agency

SO ORDERED:

/s/Leonard B. Sand
Leonard B. Sand, U.S.D.J.

Dated: January 28, 1988

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
and	)	
	)	
YONKERS BRANCH – NAACP, *et al.*,	)	80 CIV 6761 (LBS)
	)	
Plaintiffs-Intervenors,	)	
	)	
v.	)	
	)	
YONKERS BOARD OF EDUCATION, *et al.*,	)	
	)	
Defendants.	)	
	)	

LONG TERM PLAN ORDER

Section 17 of the First Remedial Consent Decree in Equity (the "First Decree") requires the City of Yonkers to take certain actions with respect to the long term housing plan (the "Long Term Plan") required by Section VI of this Court's May 26, 1986 Housing Remedy Order. Section 18 of the First Decree further contemplates that the parties may reach an understanding with respect to certain issues relating to the implementation of the long-term Goal[1] and shall set forth such understanding in a Second Remedial Consent Decree to be presented to the Court.

[1] All capitalized terms not herein defined are used as defined in the First Decree. Housing- and zoning-related capitalized terms (not defined herein or in the First Decree) used in Sections 2 and 8 hereof are used as defined in Chapter XVII of the Code of the City of Yonkers.

The City has failed to take those actions which are the subject of Section 17 of the First Decree. The City has further informed the Court and the parties that it will not negotiate toward reaching an understanding on certain other Long Term Plan issues, as required by Section 18 of the First Decree. In light of these actions of the City of Yonkers, plaintiff and plaintiff-intervenors have jointly submitted a Long Term Plan proposal for the Court's consideration, accompanied by their joint amended Long Term Plan comments and a joint motion for this Court to enter their proposal. Having reviewed these submissions, and the response of the City thereto, the Court hereby enters the following Order with respect to the Long Term Plan:

It is hereby ORDERED, ADJUDGED and DECREED:

SECTION 1. *Number and Distribution of Assisted Units.*

(a) Consistent with Section 17 (a) of the First Decree, the City shall condition the construction of any multifamily housing development (as defined in Section 17(a) of the First Decree and Section 2 below) on the inclusion of a number of assisted units in such development equal to 20 percent of the maximum aggregate number of units authorized for construction in such development. In instances where the existing zoning already permits a density of sixty (60) units per acre or more, the number of assisted units can be limited to 10 percent or more of the total number of units in the development, if the maximum density bonus that will then be given to the developer is not in excess of 50 percent over the permitted zoning. If the bonus sought is in excess of 50 percent over the permitted zoning, the 20 percent ratio shall apply.

(b) The total number of assisted housing units (calculated as provided in paragraph (a)) in each such multifamily housing development shall be allocated to the income groups specified in Section 15 of the First Decree so that the number of assisted units respectively allocated (i) to households described in clause (b) of such Section does not exceed three times the number of assisted units allocated to households described in clause (a) of such Section; (ii) to households described in clause (c) of such

section does not exceed the number of assisted units allocated to households described in clause (b) of such section; and (iii) to households described in clause (d) of such Section does not exceed one-third (rounded to the nearest whole number) of the number of assisted units allocated to households described in clause (c) of such Section. Notwithstanding the previous sentence, if the aggregate minimum number of assisted units to be allocated to any of the four income groups specified in Section 15 of the First Decree is attained before the minimum is reached for remaining groups, assisted units constructed thereafter shall be allocated (in the same proportion) only to income groups whose minimum has not theretofore been attained.

(c) The number of two-bedroom assisted housing units to be provided in each such housing development shall equal at least 60 percent of the total anumber of assisted housing units. At least 30 percent of the assisted units in each such housing development shall be three-bedroom units (or larger). Up to 10 percent of assisted units may be one-bedroom.

SECTION 2 *Target Areas.*

(a) The assisted housing requirement described in Section 1 above shall apply, until the Goal is reached, to multifamily housing (including apartment buildings, rowhouses or townhouses) located in zoning districts of East and Northwest Yonkers currently zoned MG, M, A, B and BA. In reviewing and approving development proposals, the Office of Implementation (see below) and the City shall seek, to the extent possible consistent with the timetable and goals of this Order, to assure the provision of assisted housing in a dispersed manner and so to avoid the undue concentration of both public and assisted units in any neighborhood of Yonkers. Priority shall be given to Long Term Plan proposals which avoid such concentration.

(b) Such requirement shall also apply, until the Goal is reached, to multifamily housing (including apartments buildings, rowhouses or townhouses) built in any zoning district of East and Northwest Yonkers (not currently zoned MG, M,

A, B or BA) where multifamily housing may hereinafter be built pursuant to rezoning, special exceptions or otherwise.

(c) Notwithstanding paragraphs (a) and (b) hereof and anything set forth in the First Decree, the City may exempt from such requirement any multifamily housing development of fewer than ten units; provided, however, that such exemption shall not be applied to circumvent (by, for example, artificially subdividing one housing development into several developments of fewer than ten units) this Plan's purpose of requiring that multifamily housing in East and Northwest Yonkers otherwise contain at least 20 percent of assisted units.

SECTION 3. *Affordability Criteria.*

The term "affordable", as used in Section 15 of the First Decree, means, with respect to each income category described in such Section, assisted housing units (i) sold at a price entailing a monthly carrying cost (assuming a 10 percent downpayment, a 30-year self-liquidating mortgage, and including principal and interest payments, property taxes, homeowners association fees, but excluding utilities) not exceeding at any time 28 percent of the annual gross income of the household occupying the assisted unit or (ii) rented at a rent (including an allowance for utilities) not exceeding at any time 30 percent of the annual gross income of the household occupying the assisted unit.

SECTION 4. *Term; Transfer Restrictions and Occupancy Criteria.*

(a) Assisted housing units shall be rented or sold only to households meeting (at the time of rental or sale) the income qualifications contemplated in Section 15 of the First Decree, as from time to time adjusted for the New York Metropolitan Area. Such units shall be the primary residence of the occupants.

(b) All assisted housing units subject to purchase shall have resale-price limitations (enforced by covenants running with the land, restrictions on registration of title, or any other appropriate legal mechanism approved by the City) which will ensure that

for a period of thirty years from the time of their first sale such housing units are sold or resold only to, and at a price affordable to, a household which is, at the time of purchase, in the same income group (referred to in Section 15 of the First Decree and as at that time adjusted) as was the seller at the time such previous owner first occupied the unit. Such resale-price limitation may be amended by consent of the parties or motion to the Court if future experience with financing sources and/or income-qualified owners of assisted units should demonstrate the practical advisability of reformulating the applicable resale-price limitation.

(c) The owner of assisted housing units for rent shall be required to assure that, for a period of thirty years from the time of first rental, such units are affordable to, and are re-rented only to, a household which is, at the time of re-rental, in the same income group (referred to in Section 15 of the First Decree and as at that time adjusted) as was the previous tenant at the time such previous tenant first occupied the unit. Assisted units for rental may be converted to units for sale subject, however, to the same ownership eligibility standards as applicable to units for sale for the remainder of the thirty-year period from original occupancy referred to in the previous sentence.

(d) The affordability and other restrictions on resale and/or occupancy shall not apply to (i) the transfer of ownership of an assisted unit between spouses or former spouses ordered as a result of a judicial decree of divorce or separation agreement (not including transfers to third parties), (ii) the transfer of ownership of a unit between family members as a result of inheritance, and (iii) formerly HUD-insured multifamily projects which, following default on the mortgage, HUD acquires or is mortgagee in possession ("MIP"), to the extent that the provisions are inconsistent with applicable HUD statutes and regulations regarding management or disposition of HUD-owned projects or projects for which HUD is MIP; provided, however, that transfers referred to in clauses (i) and (ii) do not extinguish such restrictions (whatever be the legal mechanism through which the restrictions are enforced) which shall be fully complied with in the event of any subsequent sale or rental of a unit not

specifically exempted hereby. An exempted transfer as heretofore provided in paragraph (d) shall not toll the running of the thirty-year period referred to in paragraph (b) hereof.

(e) This Section shall not be interpreted as in any way affecting or diminishing, and shall apply together with, occupancy criteria (to be applied in good faith by the City or each developer) substantially of the type set forth in 24 C.F.R. §960.205 to ensure that the personal and financial background of each potential tenant or owner of assisted units will not be detrimental to the viability of the housing development.

(f) To the extent not inconsistent with other applicable occupancy and financial criteria, the City shall endeavor to give occupancy priority to:

1) persons who, between January 1, 1971 and the date assisted housing pursuant to this Decree is made available, have been residents of public or subsidized housing in the City or Yonkers. Such persons shall be given the first opportunity to apply for such housing, which opportunity shall be afforded up until thirty (30) days following the date the final assisted housing units pursuant to this Decree are made available. Occupancy choice from among such persons applying shall be on a first-come, first-served basis;

2) residents of the City of Yonkers; and

3) persons employed in the City of Yonkers.

(g) The Implementation Office (as defined in Section 11 below) shall be responsible for pre-screening applicants who wish to occupy (as tenants or purchasers) assisted units and for maintaining a list of such pre-screened applicants. Owners or developers of housing projects containing assisted units may be allowed to select tenants or purchasers of assisted units from among the applicants pre-screened by such Office. The Implementation Office shall be responsible for monitoring the good faith application of any discretion vested in such owners or developers with respect to the choice of tenants or purchasers of assisted units.

(h) Within thirty (30) days of the date the Implementation Office assumes its responsibilities, it shall prepare occupant pre-screening procedures and criteria and submit the same to the Court and parties for review. The parties shall then meet, within 15 days thereafter, with a representative of the Implementation Office to attempt to reach agreement on a final set of procedures and criteria. If such an agreement cannot be reached, the parties shall submit the matter to the Court for resolution.

SECTION 5. *Home Ownership to be Fostered.*

The Court finds that it is desirable to foster home ownership among the occupants of assisted housing units. Accordingly, the City shall endeavor to establish such Mandated Incentives as will tend to foster the production of assisted housing for sale and shall establish a program to apply available local, state and federal subsidies to the write-down of purchase costs by eligible purchasers of assisted housing units. Notwithstanding the foregoing, no proposed housing development containing assisted units shall in any way be disfavored in negotiation with the City for a particular mix of Mandated Incentives, or be delayed or hampered in its applicable approval process solely because it proposes to offer assisted housing units for rental rather than for sale.

SECTION 6. *Architectural Integration.*

Developers shall make no locational distinctions between assisted and other units, provided that for any building eight or more stories in height, the top two floors may be reserved for market rate units. Assisted units, whether for sale or rental, shall meet HUD minimum property standards with respect to square footage. Assisted units need not be furnished with each and every amenity as a developer may choose to include in a market rate unit.[2] The City shall foster (to the extent feasible) the use of such

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[2] Without limitation, the term "amenities" is intended to encompass items such as: custom-finished basements; fireplaces; customized kitchens; specialized finished, flooring, or fixtures, etc.

architectural and design devices as will minimize the visual impact of such housing developments on the surrounding community and any distinction between assisted and market units.

SECTION 7. *Staging.* Assisted units in any housing development shall obtain certificates of occupancy no later than according to the following schedule:

Percentage of Market Rate Units Receiving Certificates of Occupancy	Percentage of Assisted Units Receiving Certificates of Occupancy
Up to 25%	0% (none required)
25% + 1 unit	At least 10%
50%	At least 50%
75%	At least 75%
100%	100%

SECTION 8. *Mandated Incentives.* Consistent with Section 17 of the First Decree, the City shall provide appropriate Mandated Incentives to attract private development of assisted housing units. The type, extent and combination of necessary Mandated Incentives to be utilized with and given to a particular developer of multifamily housing may depend, among other things, on the allocation to specific income groups of assisted units which the developer (subject to the terms hereof) elects to make, the degree to which assisted financing may be available, prevailing economic and housing-market conditions, and the developer's business expectations. Accordingly, the City should be allowed discretion to establish with each developer of multifamily housing a mix of Mandated Incentives which would encourage construction, notwithstanding the financial burden associated with the inclusion of the required share of assisted units. However, the City shall exercise such discretion in good faith to encourage the timely attainment of the Goal. The examples set forth below illustrate the types of Mandatory Incentives which the City shall be prepared to implement:

Example 1. Increase the maximum permitted Height of a Building.

Example 2. Increase the maximum permitted Floor Area Ratio of a Building.

Example 3. Change the formulas set forth in Section 107-55 (B) of the Yonkers Code for the calculation of floor-area ratios for mixed-use buildings so as to lower the contribution of stories devoted exclusively to non-residential uses.

Example 4. Reduce the minimum permitted Lot Width or Lot Area for apartment houses.

Example 5. Reduce the minimum permitted Lot Area per family.

Example 6. Reduce the minimum permitted Rear Yard or minimum permitted Front Yard.

Example 7. Grant the owner of multifamily rental housing a full tax abatement on City real-estate taxes for the percent of units which are assisted but not to exceed 50 percent of the total number of units in the development including both assisted and non-assisted units. The benefits of the tax abatement to the non-assisted units are to be provided to the developer for use in further reducing the rental payments required of the assisted units so as to make them affordable within the defined rental limits.

Example 8. Vary the extent and/or duration of the incentive referred in Example 7 depending on the extent to which the owner elects to carry a larger than required share of assisted units allocated to households in an income group described in clauses (a) and/or (b) of Section 15 of the First Decree.

Example 9. Grant a tax abatement on City real-estate taxes to households buying assisted units. An additional tax abatement may be granted to up to 50 percent of the total number of units being constructed

to be used to skew the monthly payments of the non-assisted units so as to further reduce the monthly payments required of the assisted units.

Example 10. Vary the extent and/or duration of the incentive referred to in Example 9 depending on the household's income level.

Example 11. Waive a portion of all application or processing fees which would otherwise be payable by developers seeking building-related approvals from the City.

Example 12. Grant a zoning overlay in (subject to the proviso in clause (d) of Section 17 in the First Decree) any district not zoned MG, M, A or BA.

Example 13. Cause funds in the AHTF to be applied (subject to applicable orders of this Court and HUD regulations) to site preparation or improvement at a site to be used for the construction of assisted units.

Example 14. Provide that, notwithstanding anything to the contrary contained in Chapter 107 of the Yonkers Code, a particular housing development may contain a certain number (or percentage) of units in excess of the number which would otherwise have been allowed by such Chapter.

Example 15. Cause the Industrial Development Authority (to the extent it is within the power of the City to cause such result) to provide assisted financing for the construction or permanent financing of the portion of a housing project represented by assisted units.

Example 16. Vary the extent of the assisted financing referred to in Example 15 depending on the extent to which the owner or developer elects to carry

or sell a larger than required share of assisted units allocated to households in an income group described in clauses (a) and/or (b) of Section 15 of the First Decree.

The foregoing examples embody the types of steps which (consistent with Section 17 of the First Decree) the City shall be prepared to take, as warranted, to realize the objective of attaining the Goal, as set forth herein and in the First Decree. The illustrations above do not require the City to offer a particular incentive (either as to type or extent) to any particular developer, housing development or owner. Nothing herein shall be interpreted to create in favor of a third party any right to obtain a particular incentive herein mentioned. However, in considering development proposals, the City shall act in a uniform, objective and non-arbitrary manner designed to afford all such proposals a fair opportunity to contribute appropriately to achievement of the Goal.

SECTION 9. *The Affordable Housing Trust Fund.*

The funds now and hereinafter placed in the AHTF as previously directed by this Court shall be expended (to the extent consistent with HUD statutes and regulations governing the application of CDBG funds) on (i) site-improvement projects (i.e. site preparation, sewage works, roads, etc.) for sites on which multifamily housing projects containing assisted units are to be constructed and (ii) to directly assist in the acquisition of property through a Local Development Corporation's activities. In no event shall funds be made available to private developers to defray construction or carrying costs for assisted units. Affordable Housing Trust funds may also be expended in manners otherwise consistent with HUD statutes and regulations if, in response to specific developer proposals, such other incentives will sufficiently obtain the overall objectives of the Long Term Plan. The City, therefore, shall have the right, upon obtaining Court approval, to use Affordable Housing Trust funds in other permissible manners.

SECTION 10. *Credit Against Goal.* The City may provide (on a project-by-project basis, on an area-wide basis or

otherwise) Mandated Incentives for the construction of assisted units in areas other than East and Northwest Yonkers. The City shall be given a credit of one unit of assisted housing towards the satisfaction of the assisted housing goals set forth in either clause (b) or (c) of Section 15 of the First Decree for every two units of assisted housing (allocable to households in the income group for which credit is claimed) constructed in such areas, up to a maximum credit of 100 units against each such goal. Such assisted units shall be subjected to the same occupancy, resale, architectural and other restrictions and requirements as assisted units constructed in East and Northwest Yonkers.

SECTION 11. *Expedited Review: Organizational Structure.* (a) In addition to such other procedures as may be established to render the Mandated Incentives most effective, the City shall establish an expedited review process for housing projects containing assisted units to include priority scheduling and expedited review and negotiation of applicable Mandated Incentives.

(b) The City shall centralize in one administrative department, agency or office (the "Implementation Office") the administration of this long-term housing plan. The Implementation Office shall be a part of the Fair Housing Office created pursuant to this Court's May 26, 1986 Housing Remedy Order and shall be under the direction of the Executive Director of that Office. The responsibilities of such Office shall include acting as an ombudsman before all City agencies which may be involved in the process of approving multifamily housing developments and facilitating the expeditious completion (by such other agency, department or office as may be responsible therefor) of: all reviews and approvals, negotiations with specific developers and grants (if appropriate) of specific Mandated Incentives. Such Office shall also have the power to pre-approve or screen particular proposals, to assist developers in the application process, to implement a marketing program to make widely known the availability of Mandated Incentives and of assisted units among developers and potential purchasers and tenants of assisted units, and to implement such other administrative steps as may be required or convenient for the more effective realization of the objective of achieving the Goal (e.g. the

creation of an advisory board of responsible citizens to assist in the foregoing task); provided that, the Implementation Office shall not exercise the power of other City agencies. Moreover, the administrative and coordinating functions described above shall not require that the City vest in the Implementation Office the final discretionary authority to approve specific projects or to grant specific Mandated Incentives.

(c) The Implementation Office shall remain in existence for the duration of this Decree. The Executive Director of the Fair Housing Office shall be responsible for formulating and presenting for approval and funding a budget for such Office, as well as for the hiring and firing of the employees of such Office.

SECTION 12. *"Section 8" Certificates.* The City shall consider in good faith any plans for assisting eligible families in utilizing their "Section 8" certificates or vouchers which plaintiff or plaintiff-intervenors may at any time hereafter present to the City.

SECTION 13. As specific plans are formulated for the construction of affordable housing, projections for the additional number of school age children who would occupy Long Term Plan housing developments shall be furnished to the School Board. The School Board shall advise the Court and the parties as to the capacity of the existing school system to accommodate such additional children, whether expansion is required and the impact, if any, of such changes on the School Board's ability to comply with the Educational Improvement Plan.

SECTION 14. If at any time any party to this litigation believes that a proposal for the construction of housing is consistent with and furthers the objectives of the Housing Remedy Order and the Long Term Plan, but requires an exemption from some of the specific provisions contained herein, application may be made to the Court for a waiver or modification of such provisions with respect to that specific proposal.

SO ORDERED:

/s/ L B S

Leonard B. Sand, U.S.D.J.

DATE: 6/13/88

Transcript of Court's Preliminary Opinion, dated June 16, 1993

* * *

THE COURT: The following constitutes the court's preliminary opinion concerning that aspect of the proposed modification of the long-term housing plan that relates to utilization of existing housing. The court reserves the right to alter or revise this opinion, which is being furnished to the parties at this time so that they may have the benefit of the court's thinking before presenting evidence with respect to the new construction aspect of the proposed modifications of the long-term housing plan.

The court bifurcated the existing housing phase of this hearing from the new construction phase for the following reason:

There was consensus — there was unanimity — that to the maximum extent that existing housing was available, in quotes, a term of art, it should be utilized to meet the goals established in the consent decree for the creation of 800 units of affordable

housing to meet the needs of the class found to have been victims of racial discrimination with respect to housing.

There was also unanimity for the proposition that even if one took the most optimistic view of the number of units so "available," that is, the city's projection of 450 units of existing housing over a four year period, it would be inadequate to meet those goals so that some new construction would be required.

Since new construction requires land acquisition, planning, environment assessments and so forth, it appeared to the court to be useful to quantify the realistic expectations concerning use of existing housing before addressing issues of new construction.

The definition of "availability" which we have been using encompasses;

One, location to be outside southwest Yonkers and in a neighborhood which furthers the integrative objectives of the remedy order;

Two, that it be in acceptable physical condition, which relates to the unit and the building or the complex in which it is located;

Three, that the co-operative or condominium in which the unit being located be fiscally stable;

And four, that the approval by such co-op boards or other entities whose approval is required be forthcoming.

Of course, although we have not stated it on the many occasions on which we have spoke about availability, the units must be affordable as that term has been defined in the prior orders of the court.

There is no question in the court's mind that existing vacant housing that is exists "available," as defined, should be utilized to the maximum extent, consistent with the objectives of the consent decree to provide affordable housing.

Obviously, it's a social waste to construct new housing if there is suitable available vacant housing which adequately meets the needs of members of the class. Existing housing should be available at an earlier date than new construction, it eliminates questions of environmental impact and should serve an integrative purpose to an even greater extent than would be the case with respect to new construction.

I'm talking about existing vacant housing. We will talk later about existing occupied units which present some other considerations.

Confronted last July with the city's proposed modification which envisions use of 450 units of existing housing plus some new construction and the plan submitted by the plaintiffs which called primarily for new construction with considerably less reliance on existing housing, the court deferred this hearing to enable various things to go forward.

First, the city was given a green light to go forward with its proposed plan in a test period which was initially to be a four month period beginning in July and ending in November, which test period has been extended and has continued until the date of this hearing.

At the same time, FHIO was directed to go forward with the closing of land option agreements so that proposals for new construction on privately owned land could be considered without the risk of a proposed seller of land experiencing a change of heart which might result from either economic incentives or political pressure not to make the land available for affordable housing purposes.

The results of the city's demonstration project have been disappointing from a number of aspects. Most superficially, there have been no closings. There have been submitted to the court four proposed contracts, with respect to one of which it appears the prospective purchaser has had a change of heart. Other problems exist with respect to the other three, which we will deal with

later. But the disappointment extends beyond the numbers and, indeed, the pressure for numbers may have had an unfortunate impact on the entire process.

Nor need we labor the unfortunate disharmony which has developed between FHIO and the city. Some of this disharmony perhaps results from different objectives and concerns.

For example, from time to time during this process FHIO has expressed concerns relating to the preservation of the confidentiality of data in applicants' files, concerns relating to the financial risks and burdens to which applicants who relied on FHIO for counseling would be subjected.

The city was perceived, apparently by FHIO and an apprehension which this court shares, to be more oriented toward closings, doubtless for the purpose of being able to point to concrete results at the close of the demonstration period. But this emphasis on closings has resulted in such facts as the city's reliance solely on SONYMA's fiscal analysis with respect to certain properties and the city conducting no independent study of the fiscal stability of buildings in which are located units of which the city wishes to close.

The city utilized private buyer brokers who worked together with a cooperating bank and who may also have been more motivated to a closing than a sensitivity to the needs of the clients, although the court recognizes that the buyer broker who testified, Mr. Flower, testified that he regarded the prospective buyer as his client and acted accordingly.

With respect to the city/FHIO relationship, there is also the disturbing testimony by Mr. Flower that when he was furnished information by FHIO which he later discovered to be inaccurate, he made no effort to contact FHIO and correct that information and did not do so because he had been instructed by the city not to interact with FHIO.

At times it appeared as if there was almost a primary concern in fixing blame on FHIO rather than moving the project forward.

Some of the difficulties in the city/FHIO relationship, I think, have nothing to do with personalities or scapegoating, but have to deal with some of the characteristics of the members of the class and the immediate availability or suitability of members of the class to serve the purposes of the city demonstration project.

For example, the city observed with distress that where the records were not current, there would often be difficulty in reaching the applicants. The fact that there is a greater turnover, that is, greater mobility, for example, on the part of residents in southwest Yonkers than exists elsewhere in the city is a phenomenon which should really come as no surprise and the court recalls testimony that was heard in the school aspect of the case concerning the difficulties of teaching a class in which the student body experienced a very high turnover rate, that is, classes in predominantly minority schools.

In any event, there came a time when the city concluded that it should solicit applicants independently of FHIO and it ran ads and sent mailings and conducted seminars and we do not think it is necessary or useful for these purposes to assess the proportion of blame which is attributable to anyone for the lack of success of the demonstration project. Even if one were to find that as much as half the time was not spent in an optimally productive fashion, one must recall, again, that the demonstration project was originally to be four months beginning in July.

As I will comment later, some of these problems, again, may be largely attributable to the fact that not every member of the class is presently ready, willing and able to become a homeowner, although members of the class not presently ready, willing and able to become homeowners may have the potential and the motivation to become homeowners at some stage in the implementation of the long-term housing plan.

THE COURT: (Continuing) The court is of the view that the City's proposed utilization of existing housing could not realistically achieve even a small percentage of the 450 units it projects; not because of interagency conflict, but because of certain basic flaws in the City's approach, and the failure of the plan to address the needs of many members of the class.

One has to trace the evolution of the City's alternate housing plan and one sees a phenomenon that has been experienced before in Yonkers in which there is a proposal and political response and then a revision of the proposal.

After the Yonkers Alternative Housing Plan was announced, certain political pressures developed which significantly inhibited the program. While the Yonkers Alternative Housing Plan may have represented the best good faith efforts of the Mayor and his staff to promulgate a plan which would be adopted by the City Council, the criterion for this court is not what is politically acceptable to the Yonkers City Council; rather, it is what measures are reasonable and necessary to, at long last, begin to produce affordable housing to remedy constitutional violations, now, so many years after liability has been found.

Obviously those measures which are reasonable and necessary, and which intrude as little as possible on the local political institutions and prerogatives, are to be preferred.

But as counsel for the Department of Justice has repeatedly reminded the court, long and bitter experience has shown that deference to political interests must yield when the practical consequence is a denial of a remedy.

After the Yonkers Alternate Housing Plan was announced, there was a response which at least, in part, manifested itself in the creation of an ad hoc body, now thought no longer to be in existence, called the Yonkers Cooperative and Condominium Council, or some such name.

Spokesmen for that group initially sought to obtain from the City administration a commitment to place a numerical cap on the number of units which could be utilized in any individual building or complex. Deputy Mayor Maniglia testified that his immediate response to such a request was that it was "unnecessary, unfair and violative of federal laws."

It is the City's position that it never, in fact, imposed such a limitation. And that may be literally true. But in fact, in implementation, such a cap was imposed.

Thus in the flyer distributed under the name of Mayor and Council President, called: "Questions and answers about the Yonkers Alternative Housing Plan, plus an invitation to co-op board presidents to meet with the Mayor and City Council president," Plaintiffs' Exhibit 102, the following question appears.

Large type. "Will the City place a large number of units in any one building or neighborhood to achieve the goal?"

Smaller type face. "No. In order to achieve the most equitable distribution throughout the east and northwest sections in the integrative spirit of the plan, the City shall market affordable units in as many locations as possible; affirmatively market only up to four percent of the total number of housing units at any single cooperative or condominium; discontinue all marketing efforts regarding any single cooperative or condominium at which a four percent level is reached."

In smaller type face, "By law, eligible families have the right to make inquiries regarding any co-op or condo where qualified housing is available, including any location where a four percent level has been reached."

The court assumes that that last sentence was added as an acknowledgment to the legal restraints on a cap. But this was a representation by the City that it would affirmatively market only up to four percent of the total number of housing units at any single cooperative or condominium and as the City

witness testified, it was only the City that was engaged in an affirmative marketing program with respect to this housing.

The second aspect of the response to the demands made by those who purported to be spokespersons for co-op and condo boards and owners was a commitment to seek board approval even with respect to sponsor-held apartments, although the law does not require such approval.

And the testimony has indicated that the Mayor, in fact, gave such assurances to co-op board members with whom he met and it was not until the court ruled that members of the class seeking to purchase sponsor-held apartments need not obtain co-op board approval when co-op board approval would not be required of anyone else seeking to purchase a sponsor-held apartment, that this question was resolved.

The Yonkers City Council voted to appeal that ruling but no such appeal was ever taken.

The City argues that it, in fact, did not exclude sponsor-held units from its activities and points out that one of the four contracts nearest to closing involves such a unit. But evidence of what, in fact, occurred and did not occur demonstrates that both the four percent cap and a failure to aggressively seek to acquire sponsor-held apartments characterizes the events from July to date.

There are other aspects of the Yonkers Alternative Housing Plan which are conjectural. In order for it to be implemented, state legislation has to be adopted.

I accept the fact that given the sponsorship of that legislation, passage might reasonably be predicted. But one never knows and surely one never knows the timetable for the adoption of such legislation.

For a variety of reasons, the necessary home rule message was not adopted by the Yonkers City Council until approximately a year after the Alternative Housing Plan was promulgated.

Another major uncertainty with respect to implementation of the Yonkers Affordable Housing Plan is that it relates to SONYMA's approval of some of the units only if the City of Yonkers agrees to a risk-sharing agreement. It appears that SONYMA submitted that agreement in April –

MR. SUSSMAN: February 3rd.

THE COURT: – in February, and the City has not formally responded. That risk-sharing agreement as proposed by SONYMA calls for a $6,000,000 commitment on the part of the City as its share of the sharing of the risk. And although Deputy Mayor Maniglia expressed optimism concerning the ability of the City to come up with that $6,000,000, the court finds that testimony not to be reassuring in terms of certainty of procurement and timing.

Deputy Mayor Maniglia talked about a possible utilization of a municipal bonding agency which would, in all likelihood, require City Council approval, which one could only describe as being problematic.

In sum, the court agrees that maximum use of existing vacant housing should be made, but concludes that the Yonkers Alternative Housing Plan, as in fact being implemented by the City, does not seek to maximize such use because of self-imposed inhibitions, such as the four percent cap, such as the failure to seek out blocks of sponsor-held apartments.

This latter restraint may be a result of two factors. The four percent cap may have acted as a prohibition to acquiring blocks and the prior commitment with respect to obtaining co-op board approval even for sponsor-held apartments may have caused this to have taken place.

Another factor is that the City plan had no alternative to immediate ownership. It had no rental component nor did it have any lease purchase component and, by virtue of that circumstance, did not maximize the possible utilization of existing vacant housing.

The court is of the view that if the City continued on the present procedures in implementation of the Yonkers Alternative Housing Plan, it would be incapable of producing more than a handful of units per year. But the court does believe that other approaches can and should be followed so that existing housing can be significantly utilized in a long-term plan.

A reasonable program for utilization of existing housing would involve seeking acquisition of blocks of sponsor-held apartments. We recognize that there is a line between what is sometimes referred to as the critical mass and a tipping point. And that's a very difficult line to draw and can't be drawn in the abstract.

It depends on a number of factors, including the neighborhood, the building and other considerations, which the court believes would require analysis by a disinterested expert.

With respect to the existence of such housing, the City's witness, Mr. Flower, who has been an active real estate broker in Yonkers for 30 years or so, and who is being utilized by the City as a buyer broker, estimated that there were 150 vacant apartments outside southwest Yonkers in 25 buildings owned by ten sponsors. He also testified that so far as he knows, no approach was made to any of these sponsors in an effort to negotiate the acquisition of a block for reasons as to which the court has already opined, and despite the expressions by some sponsors of a willingness, one might even say an eagerness to participate.

A reasonable program for utilization of existing vacant housing would, in this court's opinion, include a rental or a lease purchase component and would require an outreach and counseling program far different from what has now taken place.

Perhaps some of this is the consequence of there being a trial period and a demonstration project which, as I think I said earlier, perhaps unfortunately skewed what was done.

As Mr. Gale has testified, adequate counseling leading to a plan should appropriately take place after the availability of subsidies are known and after there is a specific goal for the counsling and a specific available unit.

The court finds persuasive the testimony of the government's expert Rick Cohen concerning the inefficiencies and other disadvantages of relying on negotiations with individual apartment owners. Individual apartment owners often have an emotional attachment to recouping their initial acquisition cost as contrasted to the commercial institutional interests of sponsors who hold many vacant apartments; the costs of block acquisitions per unit obviously are less.

There is further the ability, when dealing with block apartments, some of which may be too small to accommodate families, to reconfigure and rehabilitate those apartments, abilities which are, of course, lost when one deals simply on a unit-by-unit basis.

The court has repeatedly emphasized the utilization of existing vacant apartments. And I would extend that to include occupied apartments already on the market.

But I do have a concern, from the standpoint of the stability of the community and the objectives of the long-term housing plan, of a process that would encourage what one witness characterized as "discouraged sellers" to return to the market.

The purpose of this activity is not to encourage the departure from Yonkers of the present occupants of cooperative apartments. Whether one calls that "panic selling" or "white flight" or whatever name is given, that's not a goal or desirable consequence.

Therefore, the court has emphasized vacant apartments, or apartments already on the market, or apartments which are occupied under arrangements where the occupant is a relative or associate of the sponsor so that immediate occupancy could be assured without contributing to instability in the market.

As I've stated, I've concluded that the Yonkers Alternative Housing Plan as presently promulgated and implemented could surely not achieve 450 units in four years. Indeed, the City's own expert believes a goal of 50 units in the first year would be reasonable.

As I've stated, the court finds that as presently structured and being implemented, the Yonkers Alternative Housing Plan with respect to existing housing would produce so small a number of existing units as to be an insignificant factor in considering the needs for new construction.

And as I've also stated, the court further believes that maximum use should be made of existing vacant units pursuant to a program such as Rick Cohen has endorsed, a program which I believe is consistent with the views expressed by Thomas Gale.

Although the court believes it to be highly optimistic, and indeed Mr. Cohen characterizes it as a best case scenario, the court would be willing to accept, for these planning purposes, Mr. Cohen's estimates as to number of units, understanding that those estimates are based upon the assumption of utilization of sponsor apartments including blocks of apartments, a rental component, and a housing counseling program such as he described.

Mr. Cohen estimated that for the first year, it would be well below 25 units; that for year 2 there would be at most 50 to 70 units. He said that he believed it was not really possible to estimate the number of units for the third or the fourth year. And, of course, one would review at such time the actual experience.

But this overall estimate was 250 units. If that is 250 units in four years, it would be 20 units the first year, 70 units the second, and 80 units in the third and fourth years, if his was a four-year estimate. Those are, as he acknowledged, very optimistic estimates.

With respect to the three or four contracts, one of them has been withdrawn. With respect to the others, it appears that these were not among the 20 or 22 which had been culled from the group that had been jointly inspected by FHIO, that FHIO has not reviewed them and this court will not review them absent some input from FHIO.

We had some colloquy during the trial about every entity or institution which has to approve something wants to be the last to approve, and I understand that co-op boards act in a manner consistent with that.

But this court is not going to review a contract which is thereafter going to be submitted to a board for its approval. If the co-op board is unwilling to review a contract where all else is known, that is the purchaser, the subsidy, etc., if the court approves, if the co-op board is unwilling to engage in such a review prior to the court's reviewing the matter, then I think we have a fairly good indication of the attitude of that co-op board.

Now, while we're on that subject, I understand and I don't criticize the City administration for not having canvassed particular co-op boards in the abstract, that is, before there was a specific prospective buyer and other economic data was available. But I would think that before too much time and energy is expended in terms of obtaining subsidies and involvement of other agencies, there should be some canvassing of the board.

Finally, I have not addressed at this stage in this opinion the question of the structure. I have listened with great interest to the testimony and read the written report of Rick Cohen with respect to utilization for programs such as we're dealing with here of nonprofit entities.

Surely the existing relationship between the City and FHIO is not fixed in stone, it's not inevitable and there are obvious problems with it. Someone once wrote — this is in a entirely different context, it was in the context of a legislature reapportioning itself — that that process was somewhat like do-it-yourself surgery, a painful task, likely to be done poorly.

And I wonder whether the City's effort to implement this program, carrying so much of the burden itself, is really appropriate. I spoke earlier of the need to have a disinterested, objective expert deal with the question of dispersal. That's one concern.

Another concern is that I believe it is important that the class members have confidence that their best interests are being considered, and have such confidence because their best interests are, in fact, being considered, and that they're not merely pawns in a numbers game.

I invite the parties to consider and make proposals to the court with respect to restructuring, with specific regard to implementing the use of existing housing.

In response to a question of the court, Mr. Cohen indicated that there were pluses and minuses with respect to various ways in way that restructuring could take place. Whether that be done separately with respect to the existing housing or in coordination with programs relating to new construction is a matter as to which I have an open mind and do not opine at this time.

I think that I have met my goal of furnishing to the parties at this time a sufficient insight as to the court's views with respect to the existing housing component of the long-term housing plan so that when we go on tomorrow to deal with new construction, it can be done in the context of that insight.

If there are any questions — I'm not inviting reargument — but if there are any matters or any questions which I have left open on which the parties would like guidance, I will at least listen to them.

MR. SUSSMAN: If I understand the court's preliminary determination, it's to go with Mr. Cohen's advice of 250 with the distribution as you've suggested it in a projected way, if I'm understanding you correctly.

THE COURT: I will accept those numbers, believing them to be entirely optimistic and as Mr. Cohen has said, these are best scenario numbers, if, but only if, they are a part of a program which includes sponsor-held apartments, including acquisitions of blocks of sponsor-held apartments; a rental component or a lease purchase program, such as Mr. Gale just described was utilized in New Brunswick; and a counseling program which is conducted under auspices and in a manner which achieves the goals I've just set forth, that is preservation of confidence that the clients', or as the parties call them, beneficiaries' interests were being served.

* * *

DECISION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA and
THE NAACP,

Plaintiffs

v.

80 Civ. 6761 LBS

CITY OF YONKERS,

Defendant

----------x

July 13, 1993
5:00 p.m.

Before:

HON. LEONARD B. SAND,

District Judge

APPEARANCES

UNITED STATES DEPARTMENT OF JUSTICE
Attorney for Plaintiff United States
CHRISTOPHER T. SHAHEEN

MICHAEL H. SUSSMAN
Attorney for the NAACP

JOHNSTON, BARTON, PROCTOR, SWEDLAW & NAFF
Attorney for Defendant
RAYMOND F. FITZPATRICK, JR.
DAVID P. WHITESIDE, JR.

THE COURT: I apologize for having delayed these matters but maybe it gave some of you in the courtroom some insight into how the court occupies its time in those short intervals when it's not involved in Yonkers.

The court did not have the time to prepare a short opinion – they of course take much longer than long opinions – so that if this opinion is longer and more discursive than one would prefer, please understand that this is a product of time restraints. We must move this matter forward as expeditiously as is feasible.

At the conclusion of this opinion, we will invite not reargument, but the calling to our attention of any errors or misstatements or any questions the parties may have with respect to the third and final stage of these proceedings.

DECISION OF THE COURT

The following constitutes the court's opinion with respect to the second stage of the tripartite proceedings with respect to the implementation of the court's housing remedy order.

Recognizing that what I'm about to state will be repetitious, but in an effort to make this opinion self-sustaining and to put it in context, let me reiterate that we have divided the proceedings with respect to modification of the court's prior housing remedy orders into three phases.

The first phase dealt with the use of existing housing. And after hearing evidence, the court determined that a reasonable basis for proceeding was on the assumption that 250 units of existing housing suitable for use in connection with the Long-Term Planning Order could be made available at the rate of 20 units the first year, 70 units the second year, and 80 in each of the third and fourth years commencing from the date of the court's order. The court further determined that there should be a rental component to the use of existing housing and that blocks of sponsor-owned apartments should be utilized.

During the second phase of the proceedings, the court heard witnesses with respect to the City's proposed new construction plans, that is the City's Alternative Housing Plan, and also heard testimony from witnesses called by the Department of Justice and the NAACP in connection with the Fair Housing Implementation Office's report concerning possible development of 17 sites.

At the conclusion of this opinion, we'll set a timetable and procedures for dealing with the third phase, which will not require the taking of any testimony, and that is the aspect of the remedy order which deals with implementation. The attorneys and the court have come to refer to that portion of the proceedings as the "structure" phase of these proceedings; that is, by whom and by what procedures will the implementation move forward.

We begin our analysis by addressing the Yonkers Alternative Housing Plan. We begin at that point because in the court's view there was a strong presumption in favor of any affirmative proposals put forward by the City of Yonkers, if acceptable from the standpoint of realistic and efficient implementation of the Long-Term Planning Order. After all, these were proposals which had already achieved a sufficient degree of support to pass the Yonkers City Council and which would presumably be implemented with a degree of political support greater than that which might be associated with any court-imposed plan. A strong preference would exist for the adoption of such a plan.

Regrettably, however, we find that whatever presumption may have existed in favor of the City's proposed alternative plan has been overwhelmingly overcome by a demonstration of basic flaws in that plan. Deference to NIMBY cannot justify denial to the plaintiff class of the remedy envisioned by the consent decree and the Long-Term Planning Order.

Several flaws were inherent in the basic assumptions adopted by the drafters of the City plan. First, the City's plan assumed that existing Yonkers housing would furnish 450 units towards the Long-Term Planning Order's goal of 800 units of affording

housing. For reasons stated in the court's prior opinion, we have found that that was an unrealistic goal in the light of actual experience and other factors set forth in the court's prior opinion, and that a 250 unit estimate for utilization of existing housing was more realistic.

(The court might note parenthetically that subsequent to the ruling with respect to existing housing, the New York State Legislature has adjourned without adopting the "Home Rule" message, which was a prerequisite to the City's proposed use of certain state subsidy grants for existing housing as opposed to new construction. Whether that is temporary or permanent, one doesn't know, but it is simply another reason why there were defects in the City's appraisal of the potential for use of existing housing.) I will have more to say about use of existing housing later in this opinion. It is a matter which the court believes should be given a very high priority.

A second flaw in the City's Alternative Housing Plan was that it provided only for owner-occupied town houses. Thus the City's proposal contained no rental component and contained no forms of housing other than town houses.

As the City's principal planning witness, Mr. Saccardi, testified, it was a given upon which he proceeded, based on his instructions from the City, that the form of housing to be placed on four sites designated by the City was to be town housing. He was not called upon nor did he make any determination as to whether or not any other form of housing was more appropriate for the sites in question.

So, too, the architect retained by the City was instructed to design site plans for the four sites in question using the town house form of construction. The deposition testimony of Lee Ellman, the planning director of the Yonkers Planning Board, confirms that this is the process that took place.

For the reasons we will more fully state below, these assumptions were flawed in that the town house construction is not

appropriate for at least two of the sites in question, the Cross Street and Saint James Terrace sites. The lack of a rental component in the City's proposal is also a significant defect, it being the court's opinion as expressed with respect to our ruling concerning existing housing that not all members of the plaintiff class in need of affordable housing are now ready, willing and able to become home owners.

The court recognizes the various factors which impel a desire on the part of the City to rely on home ownership, and is prepared to accept home ownership as an ultimate goal for most members of the class. But for some, that ultimate goal does not meet their present housing needs.

A further failing of the City's proposed alternative plan is that it calls for the immediate acquisition of the sites in question by purchase using community block development grant funds. Pursuant to the City's proposal, that acquisition would take place prior to the issuance of requests for proposals from builders and prior to obtaining concrete assurances that necessary state and federal subsidies would be obtained. This procedure would commit virtually all of the FHIO's CBDG funds in one fell swoop and would deprive that office of funds with which to conduct its other activities.

The City proposed that some of this money, that is money used for land acquisition, would be recouped when the subsidies were obtained at a later date. But as the City's own expert acknowledged, there has been no prior occasion in which governmental subsidies were made available in such amounts and under such circumstances as would enable such recoupment.

Finally, the City's proposal, even if one were to accept its overly optimistic estimates as to the potential for existing housing, fell far short of the goals set by the LTPO and it was acknowledged by the City that there would have to be the development of further housing on other sites to achieve those goals, a point reiterated in the City's posttrial memorandum.

But the proposal contained no designation of such sites or data with respect to how additional housing would be financed or obtained.

Let me say a word about the goal of 800 units of affordable housing, its origin, and the role which the court views it is playing in these proceedings.

At the time the consent decree was submitted to the court, the court had directed the parties to brief the question of how many units of affordable housing should be included in the court's order consistent with the obligation of the court to fashion a remedy appropriate in light of the impact of the racial discrimination in housing which the court found to exist.

In this regard, the court had proposed a spectrum for comment by the parties ranging from 200 to 800 units, and asked the parties to respond as to the number deemed appropriate. This matter was pending at the time the consent decree was presented to the court. The consent decree designated 800 units as the appropriate number of units to be provided and the court adopted the provisions of the consent decree. The 800 unit goal has remained in this case and indeed no party has explicitly requested the court to alter that goal. But times may change and circumstances may change.

The court would not, for the mere sake of achieving a goal set some years ago, order or encourage the construction of any units that were not truly needed or which changes in demography or the state of the market with respect to housing or any other circumstances rendered inappropriate.

Were the court to be presented with an effective, realistic plan which adequately addressed the needs of the class and the goals of the remedy order, but which fell somewhat short of 800 units, or were the court presented with a record of actual achievement of construction and occupancy of units and asked to modify the 800 number goal in light of that experience and achievement, the court would give such an application serious and sympathetic

consideration. The court has made this view known to representatives of the City of Yonkers for many years, almost immediately after the furor which attended the consent decree. But none of that is presently before the court and we address the adequacy of the plans proposed by the City and by FHIO in light of the existing goal of 800 units.

Turning to the City's proposed sites and proposed site development, the Cross Street project is an appropriate place to begin our analysis. It is appropriate both in terms of contrasting the City's proposal with the potential of the site, and is also illuminating with respect to one of the possible reasons, in addition to the radical change which has occurred with respect to the Yonkers real estate market since the Long-Term Planning Order was first adopted, why no greater progress has been achieved in terms of implementation by private developers.

Cross Street was the site of a proposed private development, pursuant to the Affordable Housing Ordinance, as a rental project comprising 39 units. The project was well advanced in the planning and approval stage, and was consistent with all of the restrictions of the MG zoning designation for the site. There were no variances sought from the Yonkers Planning or Zoning Board.

The Yonkers Planning Board nevertheless rejected the proposal for reasons we find to have been pretextual. At some point the City proposed to purchase the site for $1,200,000 and now proposes that the site be used for 14 units of town house construction.

The court is of the view that the City's proposal would be an inappropriate utilization of this site, both from the standpoint of zoning and compatibility with the surrounding neighborhood. The site will readily sustain a higher density.

The court regards the proposed use of the Cross Street site by the City as being somewhat in the nature of a preemptive strike, recognizing the appropriateness of the site to provide a greater number of units of affordable housing, the City has

caused a privately proposed plan not to go forward and has come up with a plan which from every aspect is an inappropriate underutilization of the site. We'll have more to say about this concept when we consider the next site which is the Yonkers Avenue, Saint James Terrace site.

Here, as was the case with respect to Cross Street, we have a site which both the City and FHIO agree is appropriate for utilization and implementation of the remedy order. The site proposed by FHIO abuts the Trade Winds Motel and the City has indicated that it regards the Motel as being a blight, the removal of which would be appropriate regardless of affordable housing considerations. Although FHIO proposed utilization of a portion of the site abutting the Trade Winds, it agrees that utilization of the entire site would be more appropriate. Use of the greater site would not increase the number of units which FHIO proposes but would reduce the scale of the building which it proposes.

The City proposes development of 24 units of single family semi-attached owner occupied housing located on the 1.6 acre site which is on the north side of Yonkers Avenue. To contrast the difference between the City's position and FHIO's position with respect to this site, FHIO proposes that construction of 98 units, 70 of which will be market units and 28 affordable units in a multi-story rental building. An inspection of the site, the surrounding neighborhood and consideration of the City's proposed development of that site makes certain points quite apparent.

The site is in a mixed use area on a major thoroughfare, Yonkers Avenue. The placement of housing in the manner indicated in the City's proposal would be entirely inappropriate, indeed anomalous for that site.

The City's proposal for the housing units on Saint James Terrace envisions an inward-facing courtyard arrangement with access on Yonkers Avenue. By stone walls and landscaping, the plan would seek to isolate the housing from its surrounding

environment. We make reference to this, recognizing that it would be possible to alter the arrangement to have the houses oriented outward rather than inward and make other minor adjustments, but we believe it emphasizes the intent of the planners to create an isolated enclave rather than an adjunct to the surrounding community.

And this is perhaps as good a point as any to comment upon the integrative goals of the housing program. The intent of the court's order was not simply to create housing, but to create housing which would have a racially integrative effect on the Yonkers community. This integrative effect can be accomplished in a number of ways.

First, of course, there is the selection of the neighborhood. All of the housing proposed by both the City and FHIO relate to sites other than those with significant minority population, and in that respect all of the sites under discussion would serve integrative purposes.

However, in addition to the selection of the site, two other considerations enter into the ability of the housing to be integrative. One is the design and orientation of the site itself. Does the proposed housing relate to the community? Will the access and flow of the occupants serve to make the residents of the community a part of the greater community or simply residents of a special enclave?

The other manner in which the integrative impact of housing can be enchanced relates to the selection of the occupants themselves, a point as to which we will have more to say when we deal with the FHIO proposals.

In sum, the court finds that the greater Saint James-Yonkers Avenue site referred to as site 8B in the FHIO report is indeed an appropriate site for housing. The court further finds that the proposed utilization by the City of the site for 24 units is an inappropriate, underutilization of the site's potential.

We turn next to the Fort Hill Road site which the City has proposed as one of its four sites and which FHIO has placed low on its list of priorities as a site which would be utilized as a last resort. Such sites have been referred to in the record as "reserve sites."

The Fort Hill Road site abuts the town of Greenburgh. Indeed, although no housing is proposed by the City on a portion of the site, a portion of the site is indeed in the Town of Greenburgh. The City of Yonkers has no condemnation power which extends beyond its borders, and thus, if negotiations with the owners for the acquisition of that site should break down, the City could not acquire the entire site by the condemnation process.

Representatives of the Town of Greenburgh have made known to the court their opposition to utilization of this site because they claim that it will have its greater impact on the Town of Greenburgh rather than the City of Yonkers. Putting to one side questions of whether the Town of Greenburgh has any standing to make this point or has any rights in this matter, we nevertheless conclude that if the Fort Hill Road site is to be considered at all as a potential site for affordable housing, it should be given the lowest priority and no steps to include this site should be taken at this time. If and when it should become necessary to consider use of the Fort Hill Road site, the court would accord the Town of Greenburgh an opportunity to make its views known in a more formal fashion.

The primary reason why we reject the Fort Hill Road site is because its integrative effect on the City of Yonkers would be negligible. It relates more to the Town of Greenburgh than the City of Yonkers. The site is a problematic one, both in terms of its topography and it's traffic problems. The access proposed by the City would be on Fort Hill Road, near a major traffic intersection. We agree with the position taken by FHIO that the Fort Hill Road site should be utilized only as a last resort if all other proposals fail to meet the goals of the Long-Term Planning Order and no better alternatives can be found.

The fourth site proposed by the City is a Warburton Avenue site on which the City proposes the construction of 26 units of affordable town house construction. The City's proposed site is in the northwest corner of Yonkers near the Towns of Greenburgh and Hastings. Although there was little discussion of this site at the hearing, there was considerable discussion concerning FHIO's proposal to develop three other sites in the Warburton Avenue area: site 7; Warburton Avenue, site 13; the Warburton/Untermeyer site, and a site which FHIO regards as a reserve site, site 17, referred to as the Warburton/Greystone site. Since we believe that utilization of these other sites presents a greater potential for furthering the goals of the Long-Term Planning Order, and we further assume that it would be not desirable to utilize all of the Warburton Avenue sites for affordable housing purposes, we will refrain from further comment on this site.

In summary, with respect to the City's affordable housing program, we find that two sites, Cross Street and Yonkers Avenue, are appropriate sites to be developed by affordable housing but in a fashion other than that proposed by the City. We find that the Fort Hill Road site is an inappropriate site except as a last resort and we decline further consideration of the City's proposed Warburton Avenue site pending further analysis of the Warburton Avenue sites proposed by FHIO.

We turn then to the FHIO proposals and to its analysis of 17 sites. We find that these proposals offer promise but are not free from some doubts and concerns.

FHIO set forth what might be described as a menu of proposals which, if entirely implemented, would entail a five-year development schedule and would encompass the construction of 474 units of affordable housing in conjunction with 592 units of market-rate housing. FHIO also envisioned over the five-year period construction of 150 units of small site new construction in conjunction with 100 units of market-rate housing and projected the use of existing housing to the extent of 150 units. Thus, the grand total of the FHIO five-year program would be 774 units of affordable housing and 692 units of market-rate housing.

Since we have found that 250, not 150, units is a more reasonable estimate of the potential use of existing housing, since some of the 800 unit goal may be achieved by housing in southwest Yonkers, and for reasons we shall more fully develop later in this opinion with regard to market-rate units, we believe that it is highly unlikely that new construction will be required to this extent. If the City's plan offered too little, it might appear that FHIO offered too much, unless one regards, as FHIO urges, its proposals to constitute a spectrum of possibilities from among which choices must be made and priorities assigned.

During the period of time when motions for modification of the Long-Term Planning Order were pending and the City of Yonkers was being accorded an opportunity which it had requested to demonstrate the potential for use of existing housing, the court directed that FHIO obtain options to acquire privately-held land which it proposed to include within its recommendations to the court. This step was taken to avoid experiences such as those which occurred at Cross Street. It was also designed to preclude the owner of privately-owned land being subjected to community pressure not to make the land available, or to enable the owner to encourage an auction process between those who wished to utilize the site for affordable housing and those who wished otherwise. It was also designed to assure that the time, effort and money was not expended in study of construction costs and other prelimiaries related to a site only to find that the owner had had a change of heart.

This program has been successfully completed by FHIO and thus FHIO includes in its recommendation sites over which it has, in this fashion, obtained control, except, of course, for sites already owned by the City. And a schedule of such options, their expiration dates and renewal provisions, is set forth in the FHIO posttrial submission.

Further, FHIO proposes that at some point, in the immediate future with respect to some of these sites and in the reasonably foreseeable future with respect to others, requests for proposals will go out for those sites in a priority list which we'll discuss

later. It is only after there have been received suitable RFP responses and subsidy grants have been committed or assured that FHIO would cause the options to be exercised. Thus, there would not be the risk of investing funds in land acquisitions for sites which might ultimately prove to be unsuitable for affordable housing.

Now, one criticism which has been advanced on behalf of the City and some of its experts with respect to this procedure is that it eliminates or significantly minimizes creativity on the part of a would-be developer who is presented, as a fait accompli, with a set of plans such as are contained in the FHIO report.

We do not understand the FHIO plans to be of this nature. They are put forth, as the court understands it, as suggestive uses of the property to generally inform a prospective bidder as to the desired use of the property. But the RFPs should specifically permit the bidder to suggest other means by which the site could be utilized to achieve the intended goals. Not only design considerations but market factors and relations with funding sources make this degree of flexibility appropriate and indeed essential.

Some of the other significant differences between the FHIO approach and that of the City have already been discussed, the inclusion by FHIO of housing types other than town house style and the inclusion of a rental component.

FHIO describes some of the proposals as being 50-50 market-rate/affordable housing units and the Saint James Terrace as being 70-30 market-rate/affordable housing. And much of the hearing was devoted to the appropriateness of this approach.

The criticism most zealously pressed is that the inclusion of market-rate units was unrealistic because there would not be an adequate demand for such units in a City which had a glut of market-rate units in the form of co-ops and condos in addition to single family housing already on the market.

The second major criticism is that the inclusion of market-rate units would be inconsistent with some of the proposed subsidy programs which would be a potential source of financing and would result in a subsidization of market-rate units in an impermissible fashion.

To these objections, FHIO makes a number of responses. When I say "FHIO", I refer to those witnesses called by the plaintiffs who served as consultants to FHIO, and FHIO's written submissions.

First, FHIO asserts that by virtue of the more spacious nature of the units intended, the fact that they are new construction and the quality of the design, the so-called market-rate units would indeed find a demand in the City of Yonkers.

Second, FHIO asserts that the unit price for the so-called market-rate houses will be such that they would be affordable and attractive and available to persons within the 80 to 120 percent of County median income range which would qualify the would-be purchaser for inclusion as a member of the class which is the beneficiary of the Long-Term Planning Order.

In this sense, FHIO is in essence saying that all of the units would serve to some extent the needs for providing affordable housing within the particular locality in which the sites are to be found.

I should note that when we talk of county median income, we're using the Westchester County median income, which, according to the 1990 census, is $55,000 for a family of four, which is $11,000 greater than the Yonkers median income of $44,000 for a family of four.

With respect to each of the proposals set forth by FHIO, there is a pro-forma statement which indicates what percentage of units are intended to be occupied by particular income levels. Taking the Cross Street site as an example, FHIO proposes that

it be utilized to generate 14 market units and 14 affordable units. The 14 affordable units would be broken down to be 2 at 0-50% of the County median, 6 at 50-80% of the County median and 6 at 80% of the County median to market. 14 additional units would be available to those who were at 100% of the County median and these are referred to by FHIO as market units.

Each site also has in the pro-forma furnished by FHIO, an analysis of the proposed development costs, revenue and subsidy sources. The City focuses on the projected cost per units at Cross Street of $183,200 and the projected development revenues for those 14 units of $159,700 and reaches the conclusion that this would be an impermissible subsidy for market-rate units.

There are several responses or possible responses to this claim. First, it is not at all clear to the Court that the agencies which grant subsidies would analyze this proposal in the manner utilized by the City. The fact, to use an example, that a developer at 80-20 housing may receive certain tax abatements or subsidies does not generally give rise to the objection that the market rate units included in the 80-20 are being improperly subsidized.

To some extent, the problem is a semantic one which arises from the description of the units as market-rate units despite the fact that it is intended that the units so described would be affordable to members of the class.

In the classic 80-20 market affordable housing, such as was envisioned by the original LTPO, the theory was that the builders' profit derived from the sale of market-rate housing would subsidize the affordable housing. In that sense, the FHIO proposals are not the usual market-rate affordable housing proposals. But what the program is designed to achieve is the creation within an individual building site of a racial-socio-economic integration. If that goal is achievable, it would be a desirable goal consistent with the objectives of the LTPO.

The Court has listened carefully to the testimony proffered by the City disparaging the ability of the proposed projects to attract market-rate purchases. And when I use "market-rate," I'm using "market-rate" as a defined term in the sense to which we have already referred. Now, were the FHIO proposal to be structured in the same fashion as the City's proposal, that is, acquisition of the land while the market and subsidy's uncertainties remain, this would give us great concern. But the acid test, at least the initial acid test of the viability of the FHIO proposals, is whether they will in fact attract bidders in response to an RFP who will be satisfied as to the viability of the project and the ability to obtain the requisite subsidy. These matters will be known prior to the exercise of the option. In short, what we envision FHIO is asking of the Court is that it be given an opportunity to move forward with these projects in a sequence which we will discuss in a moment, and with the understanding that if the RFP does not result in affirmative responses from the building community, that the particular proposal will have to be abandoned or substantially modified. Just as the City was given an opportunity to demonstrate the feasibility and reasonable expectations of the utilization of existing housing, so FHIO asks that it be given an opportunity to move forward with these proposals.

There are a number of issues which arise by virtue of the FHIO effort to enhance the integrative impact of the affordable housing by inclusion of market-rate units. The Court will state some of these issues and the reasons why we believe more need be known before these issues can appropriately and definitively be resolved.

First, there is the question of the availability of the government subsidies cited in the FHIO report. FHIO asserts that these projected subsidies are realistic. Both FHIO and the City have been working with the New York State Housing Commissioner Apponte, and FHIO believes that to the extent to which there is reliance on New York State subsidies, its proposals are consistent with a Memorandum of Understanding to FHIO from Commissioner Apponte.

The Court wishes to take this opportunity to express its appreciation and that of the parties to Commissioner Apponte and the members of his staff for their offers of assistance.

Assuming the availability of subsidies, further issues are presented. To what extent will purchasers of "market-rate" housing whose income levels would qualify them for inclusion in the plaintiff class be subject to resale or other restrictions? If in fact purchasers of market-rate units are eligible class members, to what extent should the creation of such units be credited to the 800 unit goal? The City urges that full credit should be given to all such units. The NAACP urges that the credit computation should be deferred until after the unit is in fact occupied and the income level and existence or nonexistence of restrictions upon resale of the unit are known.

A further concern exists as to how these units are marketed, consistent with applicable legal restraints, such as those imposed by United States v. Starrett City Associates, 840 F.2d 1096, (2d Cir.) Cert. denied, 488 U.S. 946 (1988), to maximize the integrative impact which the units are designed to serve.

The Court understands and is sympathetic with FHIO's resistance to creating, except for the possible Lake Avenue site, housing which is entirely assisted housing and identified as such.

We believe that the desirability of having mixed assisted and market-rate housing units in a single site is sufficient so that it should be pursued.

This exploration will involve the participation of a number of persons not presently before the Court, including funding agencies, governmental and private, and developers. We believe that the RFP process should go forward, pursuant to a schedule and priority list to be established. The RFPs should seek to maximize the number of true market-rate units, not to exceed those set forth in the FHIO proposals, that is the maximum number which costs, subsidies and developers analysis of market demand will permit.

If it is concluded that all or a significant number of true market-rate units cannot be built, decisions will have to be made whether it is preferable to proceed on an all-assisted housing basis or whether other modifications to the proposals should be made.

How the housing is presented to the public — that is, whether it is presented as limited-assisted housing or as mixed housing — and how the subsidies and LTPO goal credits are computed need not be the same.

We believe that it would not be prudent to attempt to resolve these many issues without their further development with the participation of the other necessary parties. We note, however, that we are entirely sympathetic with the view that all units constructed with the significant aid of public subsidies and made available to persons eligible to be members of the class and occupied by such members should be credited to the 800-unit goal regardless of the fact that for good and understandable reasons those units are portrayed as "market-rate" units.

With respect to the availability of funding and developers, the Court notes the interest expressed by the Westchester County Building Trades Council, and the offer on behalf of an AFL/CIO affiliate. One would hope that an implementation of this program would provide not only housing opportunities, but would provide local employment opportunities as well.

FHIO has suggested a sequence of development pursuant to which in year One, the Cross Street-Yonkers Avenue/Trade Winds and Hoover Road sites would have the highest priority. We agree that all three of these sites are suitable, will clearly be needed, and should move forward on a priority basis. Also, the existing housing development should move forward at full pace. We need not reiterate the views be more fully expressed in our prior opinion that use of existing vacant units is not only the most socially useful way to create housing opportunities, it should also be the most expedient and have the greatest integrative impact.

During year Two, FHIO proposes that the Scarsdale Road/Warburton/Untermeyer sites will have priority.

During year Three, FHIO proposes the Midland Avenue/Sweetfield Circle and Pryor Place sites have priority.

During year Four, FHIO recommends the Rutman Road and Warburton Avenue site.

And during year Five, the Lafrentz Place/North Broadway and Scarsdale Road/Westchester Avenue sites would move forward.

The reserve sites identified by FHIO would be the Bronx Terrace/Bronx River Road, Lake Avenue, Fort Hill Road and Warburton/Greystone sites.

As was developed during the hearing, it is not possible to compartmentalize the sites in this absolute fashion — that is, year by year. Some sites may prove to be unsuitable because of construction site problems, not yet fully tested and known, or other as yet unresolved uncertainties. The rate of progress with respect to a particular site may also be impacted by the expiration dates of the options to acquire that site or the ability to obtain extensions of those options.

On a positive side, the greater than anticipated achievement rate with respect to utilization of existing housing, that is greater than the 250 projected units, may make it appropriate to scale down or eliminate some of these sites. The question of the ultimate treatment of the so-called market-rate units and their credit toward the 800-unit goal may also have this impact. Also, rehabilitation or other projects in southwest Yonkers will have an impact.

There is a need for a periodic review of all the sites and all of the proposals, and experience has surely taught us that market conditions may change, other circumstances may change, and an attitude of flexibility is appropriate.

The Court recognizes that the negative side of flexibility is uncertainty, and the Court is mindful of the concerns expressed, for example, in the affidavit of Mary Walsh, on behalf of the amicus Crestwood Association that uncertainty with respect to the utilization of potential sites unsettles and, perhaps, depresses the market. As to this, the Court has two responses:

One. There really is no feasible alternative to the uncertainties which obtain at the present time. There are simply too many contingencies. Sites are proposed which are claimed by the City to be potential wetlands sites. Whether they are mapped or not mapped as wetlands sites, whether rock conditions exist on certain sites which would make development prohibitively expensive, are questions which have not been fully analyzed. This Court cannot now, should not now, beyond year One, come up with an absolute list of sites which will be utilized and the sequence in which they would be utilized. It would be very attractive to the Court were it able to do so, but it is just not realistic.

Second. The experience with respect to the public housing units which have, so far as the Court is aware, been overwhelmingly favorable, should serve to allay some of the concerns as to the impact which proposed housing would have on surrounding areas and property values. Whatever is true with respect to public housing should be true a fortiori with respect to affordable housing.

FHIO should move forward — we'll discuss structure in just a moment — generally along the lines set forth in its proposal. As indicated, highest priority should be given to the Cross Street and St. James Terrace properties which are farther advanced, require no zoning changes, and should, in short order, be ripe for the issuance of RFPs. The Hoover Avenue site is also, in the Court's opinion, appropriately designated for early development. I emphasize, again, that the existent housing program should move forward concurrently and expeditiously.

With respect to the balance of the sites, where there are as yet unresolved issues, such as those I have just alluded to, wetlands or soil conditions, and so on, and further testing is required, those tests should move forward, and a schedule for periodic reporting and evaluation should and will be established.

That I think brings us to what the Court regards as the remaining major issue in this case, the so-called structure or implementation aspect of these proceedings. There is no question that when the City of Yonkers and FHIO are of one mind and act as a cooperative team, such as occurred with respect to the Trinity Court Project in southwest Yonkers, much can be accomplished. But where there is disharmony, much time and effort is wasted.

Apart from the relationship between the City and FHIO, there is another concern, the amount of work which remains to be done is overwhelming. It is far beyond the capacity of the deputy mayor and Director of Planning of the City of Yonkers and their staffs, and it is far beyond the resources of FHIO to alone move forward with these projects. The question of how one implements the Court's order with respect to the existing units is, in and of itself, a task of great magnitude.

The Court found of great interest the testimony of Rick Cohen, suggesting that FHIO form a relationship with such organizations as the Enterprise Foundation or the New York City Housing Partnership, or other existing entities whose role is to assist in the coordination of efforts for the development of affordable housing, including dealings both with the builders and with finance sources. There is just another bit of irony in Yonkers that Mr. Cohen testified to, that his first contact with Yonkers was when Mayer Zaleski offered him a post of, I believe, Director of Planning, and which he declined for personal reasons.

At the Court's request, Mr. Cohen has submitted a letter dated July 11th, which I'll mark as Court Exhibit 1 of today's date,

setting forth some of the organizations which exist which render these services, such as the Enterprise Foundation, the Community Builders, the New York City Housing Partnership, the Community Preservation Corporation.

The development of such partnerships and the utilization of the resources and expertise of others who have been involved in similar activities in other communities should be availed of to the maximum extent possible.

Further, with respect to implementation, the Court views it to be an imperative especially in the light of the Cross Street experience, that it be understood by the building community that so long as a developer acts in a manner consistent with appropriate standards in the industry, and in furtherance of the orders and directions of the Court, it will not be subject to harassment or delay because of possible neighborhood or political opposition.

Due deference should be given to the community views as expressed in local zoning, building codes, and other institutions of the City related to housing. But to the extent to which any measures adopted by those institutions, or any actions taken by those institutions are inconsistent with implementation of a housing remedy order, the implementation of the housing remedy order must prevail. It must at all times be remembered that what is involved in this proceeding is the granting of a remedy to persons who for a long time were the victims of intentional racial discrimination with respect to housing. That is the damage which we seek to remedy and it must be given a priority which gives recognition to that fact.

The next step is that the Court directs that the parties prepare an overall order which embodies the Court's conclusions with respect to existing housing as well as the views set forth in this Opinion and which incorporates as well a timetable and a mechanism by which the program is to be implemented. The parties are to submit such a proposed order, together with appropriate accompanying memoranda by September 16, 1993.

This date is established in recognition of the considerable thought and further analysis which must go into the preparation of such an order, as well as the necessary participation of parties not before the Court. If this time frame also affords the parties a further opportunity to explore consensus, that too would be welcome.

That concludes the Court's Opinion; and, as I said at the outset, I do not invite argument, but if there are any questions as to where we go from here, I will entertain them. And although I will be, I hope, out of the City during portions of the summer, I will be at all times available to answer any questions which may arise.

Mr. Shaheen.

MR. SHAHEEN: Two matters, your Honor.

First, in the early portion of your opinion, where you referred to testimony from the City's expert that the townhouse concept was a given in his analysis, you referred to that expert as being Mr. Phillips, and I believe the testimony came from Mr. Saccardi rather than Mr. Phillips.

THE COURT: I think you are correct. I believe it should be amended to Saccardi. [This correction has been made.]

MR. SHAHEEN: The other question I have, your Honor, with respect to what you refer to as the third phase of these hearings concerning process, I take it that you would like a further briefing on that phase to be encompassed in the submission that is given —

THE COURT: Yes, with a proposed order.

For example, where zone changes are required, my tentative thinking is that the matter should go before the zoning board. But any party should have the right to come to the Court if, after a reasonable period of time, the planning board has not

acted, the zoning board has not acted, or if there is an adverse determination which any party believes is predicated not on sound concepts of zoning, but an anti-affordable housing attitude. I throw that out as a tentative suggestion, as simply one thought, and this is what I had in mind when I spoke of due deference to local institutions to the extent relevant, but at the same time recognizing that this is the remedy phase of a racial discrimination case.

MR. SUSSMAN: Your Honor, for purposes of the order, is it our understanding that you rejected the densities proposed by the City on Cross Street and Yonkers Avenue. You did not specifically endorse — although you with Cross Street and FHIO you may have endorsed in your opinion, you didn't specifically endorse the densities which FHIO proposed. You did tell them to go forward on those sites.

THE COURT: Oh, no. That is an inadvertence.

MR. SUSSMAN: I want to make it clear whether you are adopting those densities for current purposes, the order should memorialize that, or whether you are leaving that open, or what. I didn't hear that.

THE COURT: I thought I said explicitly that the RFPs for those two sites should be predicated on the densities set forth in the FHIO order.

MR. SUSSMAN: And Hoover as well.

THE COURT: As well.

MR. SUSSMAN: With regard to the other aspect that you were specific on regarding sites, as I heard you, you indicated that the questions pertaining to the other sites, regarding wetlands, and other externalities of that sort, should be resolved by appropriate studies in the near term.

THE COURT: Yes.

MR. SUSSMAN: Okay. Do you intend to leave that to pretrial with regard to all the sites or just those for the next year? I just want to be clear on what you contemplate.

THE COURT: Well, I had deliberately not adopted a timetable with a list of priorities for the simple reason that if it should become apparent as a matter of good planning that a particular site is not suitable, it should drop out and the next site should move up, and that's why I have resisted saying this is what happens in year One. I did say what happens in year One, but I did not say this is what happens in year Two or year Three.

MR. SUSSMAN: What I'm trying to clarify, your Honor, do you want FHIO, and do you want the order to embody that FHIO will clear those environmental issues which are threshold issues, like the wetlands, the rock matter, at least to the extent that it seems to, – if it would affect feasibility, do you want them to do that for sites seriatim in the order that FHIO has proposed? Do you want them to do that for all the sites in the near term so you know which sites, if any, will have problems that will be preclusive? I think we need to be clear on that. If you can be. I understand what you are saying –

THE COURT: I think what I said was, "FHIO should move forward generally along the lines set forth in its proposal."

Now, if you are asking me should FHIO expend the monies to definitively resolve the availability of a site which is way down on its list, and which for reasons that I stated it appears improbable would be utilized, I think that's a close question. I think that it might be desirable. Simply to deal with –

MR. SUSSMAN: The first three years, let's say, or some –

THE COURT: Yes. But, also, it might be desirable to eliminate a site simply for public information purposes. I mean, if one knew for a fact that Midland Avenue site is not going to be developed, one should know that. What FHIO has done is not

just put points in a map, but has given consideration to a geographic dispersal. If a site drops out, I think that becomes significant. It is a very narrow road that I traverse in functioning as a judge and not as the urban planner. And on some of these questions, I have been very well aware of them but have deliberately refrained from deciding, because I have respect for professional expertise. I have respect for the professional expertise of all who testified here, and I would think that in the absence of litigation context, it would be very easy for the planners to reach consensus.

MR. SUSSMAN: That's true.

THE COURT: Anything further?

Mr. Fitzpatrick.

MR. FITZPATRICK: Your Honor, you asked for any corrections of a factual nature. There are two matters that I noted that perhaps should be corrected or explained.

THE COURT: Yes.

MR. FITZPATRICK: The first one is your notation that the New York State legislature adjourned without acting on the legislation requested by the City to amend the statute governing the affordable housing corporation.

THE COURT: Yes. Is this not the case?

MR. FITZPATRICK: No. I wasn't disputing that fact.

Your Honor somehow connected that, I believe, to the risk sharing agreement.

MR. SUSSMAN: Yes, you did.

MR. FITZPATRICK: And I wanted to say those two matters are not connected in any way, as far as I know.

THE COURT: Well, I may have to correct more than the opinion, by my thinking.

Are they not connected?

MR. SHAHEEN: No.

MR. SUSSMAN: Your Honor, one relates to the $25,000 which can be used currently under the law only for new construction.

THE COURT: Yes.

MR. SUSSMAN: And what the City was proposing was to use it for discontinuing. That's different than the risk share. The risk share is an agreement which the City was attempting to get in place, which is still not in place. It's not in place –

MR. FITZPATRICK: Which –

MR. SUSSMAN: Hold on.

– which agreement would allow, your Honor, for those who subsidized funded lending institutions to have some support from the State for essentially bad loans. That's a different issue.

MR. FITZPATRICK: It pales with the SONYMA program and not with the AAC program.

THE COURT: Yes, "risk sharing" should be deleted and substitute utilization for existing construction rather than the construction. [This correction has been made.]

thank you.

MR. FITZPATRICK: The other, the second note that I noted that confused me, perhaps, is the discussion of the Warburton site. Your Honor deferred further comment, and in doing so

made reference to the fact that there are three FHIO proposals, and noted as one of the three the Warburton/Greystone site.

THE COURT: Yes.

MR. FITZPATRICK: Your Honor, the Warburton/Greystone site, as listed in the FHIO report, and the Warburton site proposed by the City are the same site.

TE COURT: Are they the same site?

MR. FITZPATRICK: Yes, your Honor.

MR. SHAHEEN: Yes, your Honor, they are.

MR. SUSSMAN: They are.

MR. FITZPATRICK: You asked for corrections.

THE COURT: No, no. I appreciate it. I thought that those sites were separate.

MR. SUSSMAN: The densities are different. The designs are different. But one of the sites is the same.

THE COURT: All right.

MR. SUSSMAN: Your Honor, that's the site FHIO proposes the underground parking and higher density.

THE COURT: The City site is the northern-most site, is that correct?

MR. SUSSMAN: Yes.

MR. FITZPATRICK: Yes, your Honor.

THE COURT: Yes. All right. And at least one of those sites is proposed for a phase development.

MR. SUSSMAN: That's right. That's one of the other Warburton sites where FHIO proposes first one phase and then a second phase. Rental and ownership combined. And that's not this site.

MR. FITZPATRICK: It's listed as two different sites on the report.

THE COURT: All right.

A further good reason for me to defer on that site. The FHIO lists that site as — I'm surrounded by education documents, not housing documents.

MR. SHAHEEN: The Warburton/Greystone site, your Honor?

THE COURT: Yes.

MR. SHAHEEN: I believe that is site 17.

THE COURT: Site 17?

MR. FITZPATRICK: That's correct.

THE COURT: It is the last of its sites.

MR. SHAHEEN: The other Warburton sites, the combined sites are sites 7 and 13.

THE COURT: Yes.

Well, I don't know the answer to the question of whether if 7 and 13 are used, 17 should also be used. That's a planning decision, which I am not going to opine on now. But, certainly, if it is a site which both the City and FHIO agree is a suitable site, it certainly should receive careful consideration in the priority — is that a site, an option site?

MS. HILL: No, your Honor. It is one of the reserved sites.

THE COURT: It is a reserved site. All right.

MR. SUSSMAN: Thank you very much.

THE COURT: Thank you.

MR. BENNIA: Your Honor, –

THE COURT: Mr. Bennia had a question. I'm sorry.

MR. BENNIA: – does your Honor also want a submission from FHIO with regard to the proposed order?

THE COURT: FHIO should certainly have a great deal of input into this, since it involves FHIO to a very great extent. Whether there is a separate document which is submitted by FHIO or whether it is a joint document submitted by others is a matter of no moment.

MR. SUSSMAN: We will try to work out a joint order.

Thank you, your Honor.

(Proceedings adjourned)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	80 CIV 6761
YONKERS BRANCH – NAACP, et al.,	)	(LBS)
	)	
Plaintiffs-Intervenors,	)	
	)	
v.	)	
	)	
YONKERS BOARD OF EDUCATION, et al.,	)	
	)	
Defendants.	)	

ORDER

Pursuant to the proceedings during the hearing of September 10, 1993, the City of Yonkers is ORDERED to increase the salary of Karen V. Hill, Executive Director of the Fair Housing Implementation Office to $90,000.00 per year, effective July 1, 1993.

Dated: September 22, 1993
New York, New York

So Ordered:

/s/Leonard B. Sand

Leonard B. Sand
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, and YONKERS BRANCH – NAACP, *et al.*, Plaintiffs-Intervenors, v. YONKERS BOARD OF EDUCATION, *et al.*, Defendants.	80 CIV 6761 (LBS) **SUPPLEMENTAL LONG TERM PLAN ORDER ADOPTING ADDITIONAL REMEDIAL MEASURES**

On May 28, 1986, the Court entered the Housing Remedy Order ("HRO"). Part VI of the HRO required the defendant City of Yonkers ("City") to submit to the Court a plan for the creation of subsidized housing, in addition to the 200 units of public housing, to be located in east and northwest Yonkers. The City failed to submit a plan. On January 28, 1988, the Court entered the First Remedial Consent Decree in Equity ("First Decree") providing for the implementation of parts IV (public housing) and VI (additional subsidized housing) of the 1986 Housing Remedy Order. With respect to subsidized housing, the First Decree provided for a goal of 800 units of assisted affordable housing to be provided on a mixed use basis with market rate housing developed through private sector initiatives coupled with Mandated Incentives. On June 13, 1988, the Court entered the Long Term Plan Order (LTPO) further implementing the 800 unit goal of the First Decree and providing for a mix with market rate units on an 80/20 basis.

Due to actions and omissions by the City of Yonkers and changes in the housing market in Yonkers, this Plan failed to provide the required housing. Therefore, on June 5, 1991, plaintiff-intervenors moved the Court for entry of an order granting additional relief to require the City to provide for the construction on City-owned sites of 800 units of affordable housing in east and northwest Yonkers as envisioned by the First Decree. Plaintiff United States supported that motion. On July 8, 1991, the defendant City of Yonkers filed a cross-motion to modify or vacate the First Decree and Long Term Plan Order.

At a hearing held on July 15, 1991, the Court invited the City to submit a proposed alternative Long Term plan to meet the objectives of the Housing Remedy Order. The plan submitted thereafter by the City was not acceptable. On September 25, 1991, the Court advised the parties that the Fair Housing Implementation office ("FHIO") was identifying sites for new construction of affordable housing and seeking to obtain control of possible sites through options and delayed ruling on the alternative Long Term Plan proposals pending FHIO's completion of its efforts.

On February 25, 1992, the Court urged the parties to submit any proposals for modification of the current Long Term Plan to the Court at the time the FHIO submitted its report of available sites. On April 14, 1992, the Yonkers City Council, by a 4-3 vote, adopted Resolution 83-1992, approving the Yonkers Alternative Housing Plan (YAHP), a plan relying primarily on the use of existing housing to fulfill the requirements of the Long Term Plan Order. Subsequently, the parties were unable to agree on the terms of an Order to submit to the Court based upon Resolution 83-1992.

Consequently, on June 9, 1992, the City of Yonkers moved the Court to amend its cross-motion to vacate and further moved the Court to enter its proposed Modified Long Term Plan Order. The United States and plaintiff-intervenors submitted their own proposed orders which sought to rely more substantially on new construction to meet the LTPO requirements. At a hearing on

July 25, 1992, the Court deferred ruling on any of the motions, but instead granted, at the City's request, a four-month trial period during which the City was to demonstrate the feasibility of its proposal. The Court also ordered that the FHIO should continue its efforts to acquire options on possible sites for the construction of assisted housing during the City's demonstration period.

In November 1992, the Court granted the City's request for an additional four months, until March 15, 1993, to complete its trial project. At the end of this additional period of time, the Court announced its intention to hold evidentiary hearings in which it would hear testimony concerning the City's proposal to use existing housing and alternative proposals to rely more heavily on the use of new construction. Specifically, in early 1993, the FHIO submitted a report to the Court and the parties presenting a "menu of alternatives," which relied primarily on construction of new housing on approximately 9 privately-held sites for which it had obtained options and on approximately 8 additional City-owned sites. The FHIO report projected that only 30 existing housing units could be obtained per year.

The court held a bifurcated evidentiary hearing during the period from June 10 through July 6, 1993. The first stage focused on the City's proposal to provide 450 LTPO units over a four year period through the use of existing housing. Following that phase of the hearings, the Court delivered its Opinion on June 16, 1993. Transcript at 813-835.

The Court found that existing housing was an appropriate resource that should be utilized to the maximum extent possible for LTPO purposes. However, the Court concluded that the City's projections for the probable success of this approach were inflated and that political pressures caused the City to make choices which limited the potential effectiveness of this program. The Court further found that the existing housing program must be modified in certain respects (as embodied in this Order) to improve its likelihood of success. The Court determined that, during the next four years, it was reasonable to expect that, at

most, 250 units of existing housing could be made available to class members.

At the second stage of the proceedings, the Court heard evidence concerning the best means of fulfilling the remainder of the LTPO goal of 800 units of affordable housing. The City proposed construction of limited densities on four specific sites. FHIO, generally supported by the Department of Justice and the NAACP, presented specific design concepts, including densities, bedroom distributions, projected income ranges of occupants and designs for some seventeen identified sites for which it either had signed options to purchase or had determined municipal ownership. Following some 6 days of hearings and an inspection of the majority of the sites by the Court (with the consent of the parties), the Court delivered a second Opinion on July 13, 1993. Transcript at 1909-1951.

The Court rejected the City's proposed new construction program as too limited in scope and determined to embark on a course to test the viability of the FHIO major site proposals. The Court announced that it believed initial pre-construction activity should focus on three specific sites, Yonkers Avenue, Cross Street and Hoover Road. Both FHIO and Yonkers had identified the first two of these sites for long term housing. Based on the evidence, the Court indicated its preference for the densities and design concepts proposed by FHIO on each site.

To provide further specific direction for this phase of LTPO implementation, the Court hereby Orders the following with respect to further remedial proceedings. To the extent that any divergence exists, either specifically or by implication, between the terms of this Order and the provisions of the LTPO, the following terms shall govern the proceedings:

I. HOUSING SPECIAL MASTER

To facilitate implementation of the LTPO the Court shall designate a Housing Special Master ("HSM") pursuant to Rule 53 of the Federal Rules of Civil Procedure. In the event that no

such designation has been made by a deadline set forth herein, the function assigned to the HSM shall be performed by the Court or its designee.

II. NEW CONSTRUCTION

A. *Process for Soliciting Developer/Builders*

1. In cooperation with the parties, FHIO is hereby authorized to complete required State and Federal environmental reviews of the Yonkers Avenue, Cross Street and Hoover Road sites, assuming densities of 98, 28 and 48 units respectively. FHIO shall furnish to the parties draft environmental audits, including any required cumulative impact statement, no later than October 31, 1993. Any party wishing to comment on any aspect of said environmental reviews shall do so in writing to the HSM designated hereunder by November 15, 1993.

2. Commencing upon designation of the HSM, the FHIO and the parties shall regularly meet together with the HSM to discuss and, to the maximum extent possible, agree upon the details of site design, environmental impact, sequencing of events and site development for the three new construction sites.

3. The parties shall agree upon and submit to the HSM RFPs seeking developer/builders for the three sites no later than November 15, 1993. The parties shall also agree to a process and criteria to be used in rating and ranking the RFP submissions. If the parties are unable to agree upon any of the terms of the RFPs or such processing criteria, the HSM shall resolve the dispute with any dissenting party having the right to appeal the Master's decision to this Court. Copies of the RFPs shall also be furnished to the Yonkers Planning Board and the Yonkers Zoning Board of Appeals.

4. Within 45 days of issuance of the RFPs, responses shall be submitted to the HSM who shall promptly duplicate the submissions and provide the same to the FHIO and the parties. Copies of the responses shall also be furnished to the Yonkers

Planning Board and the Yonkers Zoning Board of Appeals. Within 15 days of receipt of the submissions, the Yonkers Planning Board and Yonkers Zoning Board of Appeals may submit their comments to the HSM.

5. Within 30 days of receipt of the submissions, the HSM, FHIO and the parties shall evaluate the proposals received on the basis of the established rating and ranking system.

6. Within 45 days of receipt of the submissions, the HSM shall inform the Court of the preferred developer/builders selected by the HSM, the required mandatory incentives, and any further deviation from municipal zoning or variances required by said developer/builder.

7. Within 15 days thereafter, any dissenting party may submit to the Court its alternative preference, as well as any comments concerning the preferred developers and any terms it has proposed.

8. If there is a dissenting party, the Court shall resolve the dispute and make the final selection, and may order provision of the Mandated Incentives and any zoning changes or variances necessary for construction of the project. If there is no dissent, the HSM may make such determination and issue such Order.

B. *Site Control*

9. The City of Yonkers currently has title to the Cross Street site. No further action of this Court is required to permit the preferred developer to acquire title to and develop this site.

10. FHIO currently holds an option to purchase the Hoover Road site. By December 1, 1993, Yonkers shall either enter into an option to purchase the Yonkers Avenue site envisioned by FHIO for development of its proposal or advise the Court that it has been unable to enter such an option agreement. In such instance, within fifteen days (15) of the selection of the preferred developer/builder for the Yonkers Avenue site, Yonkers shall

initiate eminent domain proceedings in Supreme Court of the State of New York, County of Westchester. Subject to HUD approval, which shall be explicitly given or withheld within thirty (30) days of HUD's receipt of a Request for Release of Funds, options shall be exercised for the Hoover Road site and the Yonkers Avenue site within forty-five (45) days after selection of the preferred developer/builder for that site. Alternatively, the City of Yonkers may acquire the Hoover Road site by initiating eminent domain proceedings provided such proceedings are initiated within ten (10) days of the selection of the preferred developer/builder for that site. If Yonkers chooses to initiate such proceedings, it shall promptly notify the HSM, the FHIO, and the parties, that it has done so. Affordable Housing Trust Fund monies may be used for these purchases, provided that the developer/purchaser shall be required to compensate FHIO for transferring title to these sites as per its Reply to the RFP.

11. FHIO is directed to maintain in full force and effect the various options on other privately held sites it has heretofore negotiated. FHIO shall report to the HSM and the parties every four (4) months on the status of the options and advise of any actions necessary to maintain the availability of optioned sites, as appropriate. No option shall be exercised without approval of the Court.

III. ADDITIONAL NEW CONSTRUCTION

A. *Additional Sites*

During the evidentiary hearing which concluded with this Court's Opinion of July 13, 1993, the Court identified a number of other sites which appear suitable for the development of additional long term plan housing. Indeed, all the sites proposed by FHIO have promise to this end, some more than others. At the same time, the Court notes that FHIO's analysis of these sites was admittedly preliminary and does not allow a firm conclusion that each is buildable.

Accordingly, the Court directs that by May 15, 1994, the HSM shall present a revised schedule for the second and third year development with sufficient information concerning any site proposed for inclusion to insure the environmental feasibility of said site and its reasonably prudent development, taking into account the availability of needed subsidies, the reaction of the development community to the first set of RFPs and the results of the existing housing program to that date. By June 14, 1994, any party wishing to comment on the proposed development schedule or offer specific alternatives may do so. The Court contemplates the issuance of another Supplemental Order in light of the information then and so received.

B. *Small Site New Construction*

The HSM shall develop further FHIO's proposal for a small site new construction program and report to the Court and the parties on the viability of such a program by April 1, 1994.

C. *Transfer of Responsibilities for New Construction*

At the conclusion of the hearing on new construction proposals on July 13, 1993, the Court noted that the implementation of this aspect of the Long Term Plan was far beyond the capacity of the FHIO alone. Thus, the Court expressed a desire for the FHIO to avail itself to the maximum extent possible of the services and technical assistance of national and local organizations experienced in the development of affordable housing. In addition, the Court believes that it may be appropriate that primary responsibility for implementation of the new construction component of the Long Term Plan be gradually transferred to an entity which has the requisite resources and expertise to successfully carry out this program.

Accordingly, the HSM may, after consultation with the parties and HUD, designate a third party for purposes of implementing the new construction component of the Long Term Plan. The HSM also may submit a Proposed Order appointing the implementing entity of the new construction program and

setting forth the duties and responsibilities of this entity. Any party which dissents from this recommendation may submit its own nomination for the implementing entity and the dispute shall be resolved by the Court. By Supplemental Order, the Court will appoint the implementing entity for the new construction program and delineate the specific responsibilities and means for funding the activities of this entity. The Court contemplates that this Supplemental Order also will specify what areas of Long Term Plan responsibility will remain with the FHIO. In the interim, the FHIO will function consistent with this Order and, to the extent not dealt with herein, the prior Orders of this Court.

IV. EXISTING HOUSING

Existing housing resources (including, but not limited to, cooperatives, condominia, apartments, attached and detached single family units) should be utilized to the extent available to meet the Long Term Plan requirements. After the evidentiary hearing in June 1993, the Court established a goal of 250 existing housing units during the next four years. The Court set forth a schedule which set the following annual goals:

Year 1 - 20 units
Year 2 - 70 units
Year 3 - 80 units
Year 4 - 80 units

The Court further ordered that: (1) existing units shall be made available for rental and ownership opportunities; (2) aggressive efforts should be made to identify and acquire blocs of condominium and cooperative units; and (3) the financial interests of beneficiaries should be protected by locating units only in fiscally stable buildings or by some other appropriate mechanism to the extent that other units are utilized.

1. The HSM may, after consultation with the parties and HUD, designate a third party for purposes of implementing the existing housing component of the Long Term Plan. The HSM

also may submit a Proposed Order appointing the implementing entity of this program and setting forth the duties and responsibilities of this entity. Any party which dissents from this recommendation may submit its own nomination for the implementing entity and the dispute shall be resolved by the Court.

2. If an entity is designated pursuant to Subparagraph III-C above, it shall report to the HSM and parties monthly concerning its progress and shall be obliged as well, to report any obstacle being placed in its way by any party or non-party.

V. HOUSING COUNSELING SERVICES

By November 1, 1993, the FHIO shall develop a proposed housing counseling program and submit such program to the HSM and the parties. The HSM shall report to the Court concerning the adequacy of the proposed program and the desirability of retaining these functions within the FHIO.

VI. AFFORDABLE HOUSING TRUST FUND

Yonkers is an eligible recipient of CDBG funds, much of which may be used in a manner supportive of the LTPO. In past years, up to 25% of such funds have been reserved for the Affordable Housing Trust Fund (AHTF) and purposes enumerated in prior Court Orders. Due to the failure to achieve results to date, the continuing need for such monies to implement the LTPO is apparent. For example, the *pro forma* submitted for the Yonkers Avenue new construction site, as well as for others contemplated for development in succeeding years, show a need for millions of dollars from this source. In addition, site specific planning activities for the three identified sites, and others planned for development in subsequent years, will require financing.

Accordingly, beginning with FY 1994 and continuing until further order of this Court, 25% of the City of Yonkers' annual CDBG funds shall be allocated to the AHTF. Such funds shall be available for implementation of the new construction, existing housing and housing counseling programs and, if the

amount exceeds $500.00, shall be accessed by application to the Special Master who shall make recommendations to the Court. Any such application shall reference the particular proposed expenditure as well as its rationale. Any party shall be permitted to seek modification of this allocation upon a showing that the remedial program has been implemented or that such funds are not needed for implementation of the LTPO.

VII. BENEFICIARY LISTS

Section 4(f) of the LTPO establishes priority for housing opportunities first to persons who have resided in public or assisted housing in Yonkers since 1971 and then to residents of the City and finally to those who work in Yonkers. Within each priority group, the LTPO provides preference to those first seeking assistance. FHIO has a list of approximately 950 beneficiaries in need of its services.

In the spring of 1993, the City of Yonkers began assembling its own list of potential beneficiaries. There is no record evidence establishing the overlap of the two lists.

To the extent FHIO-listed beneficiaries first sought housing opportunities by placing themselves on the FHIO list, equity dictates that their housing needs take preference. At the same time, persons who later placed their names on Yonkers' should not be penalized. The two lists must be harmonized to accord persons preference both in terms of the afore-cited priorities and the time each person has been awaiting a housing opportunity. To this end, the City shall forthwith provide FHIO with its list and FHIO shall promptly create a single list of ranked beneficiaries which it shall maintain and update. FHIO shall make this list available, upon request to the agency or administrator responsible for the existing housing program and the selected developer/builder of the three new construction sites. Both the City and FHIO shall make documents and information concerning potential beneficiaries and beneficiaries available to the HSM, the Court, and the parties, who shall also maintain such confidentiality.

SO ORDERED.

Dated: New York, New York
October 5, 1993

/s/ Leonard B. Sand
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

Plaintiff,

- and -

YONKERS BRANCH – NAACP, et al.,

Plaintiffs-Intervenors,

- against -

THE CITY OF YONKERS, et ano.,

Defendants.

----------x

80 CIV 6761 (LBS)

ORDER

SAND, J.

The parties having been unable to resolve the question of compensation to be paid to the Executive Director of the Fair Housing Implementation Office (FHIO) and two of its staff members, the Court hereby directs that their compensation shall be as follows:

1. Karen Hill, Executive Director, $90,000. Said salary is to be retroactive to January 1, 1993.
2. Linda Blake, Program Coordinator, $47,500., retroactive to January 1, 1993.
3. Albert Gordon, Assistant Program Coordinator, $41,000., retroactive to January 1, 1993.

Payment of all sums hereunder is to be made no later than November 1, 1993.

SO ORDERED.

Dated: New York, New York
October 7, 1993

/s/ Leonard B. Sand
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
UNITED STATES OF AMERICA,

Plaintiff,

- and -

YONKERS BRANCH – NAACP, et al.,

Plaintiffs-Intervenors,

- against -

THE CITY OF YONKERS, et ano.,

Defendants.
----------x

80 CIV 6761 (LBS)

ORDER

SAND, J.

Pursuant to Section I of the Supplemental Long Term Plan Order of this Court dated October 5, 1993, and Rule 53 of the Federal Rules of Civil Procedure, the Court hereby appoints Marilyn Malkonian to be the Housing Special Master.

This appointment is to take effect immediately.

SO ORDERED.

Dated: New York, New York
October 22, 1993

/s/ Leonard B. Sand
U.S.D.J.

Copies Mailed to Counsel of Record 10/22/93

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, and YONKERS BRANCH – NAACP, *et al.*, Plaintiffs-Intervenors, v. YONKERS BOARD OF EDUCATION, *et al.*, Defendants.	80 CIV 6761 (LBS) **ORDER**

To avoid any possible uncertainty regarding funding of the Affordable Housing Trust Fund, Paragraph VI of the Court's October 5, 1993 Supplemental Long Term Plan Order is hereby amended to replace the words "FY 1994" on page 13 of the Order with "FY 1993." The amended sentence shall read as follows: "Accordingly, beginning with FY 1993 and continuing until further order of this Court, 25% of the City of Yonkers' annual CDBG funds shall be allocated to the AHTF."

SO ORDERED.

Dated: December 2, 1993
New York, New York

/s/Leonard B. Sand

Leonard B. Sand
United States District Judge

Copies Mailed to Counsel of Record 12/2/93

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	80 CIV 6761
	)	(LBS)
and	)	
	)	
YONKERS BRANCH – NAACP, *et al.*,	)	
	)	
Plaintiffs-Intervenors,	)	
	)	
v.	)	
	)	
YONKERS BOARD OF EDUCATION, *et al.*,	)	
	)	
Defendants.	)	

MOTION TO AMEND CITY OF YONKERS' PENDING CROSS-MOTION TO VACATE OR MODIFY AND MOTION TO ENTER MODIFIED LONG TERM PLAN ORDER

Defendant City of Yonkers moves the Court to amend its pending cross-motion to vacate or modify certain aspects of this Court's remedial orders and further moves the Court to enter the Modified Long Term Plan Order, annexed hereto as Exhibit A. In support of this amended motion, the City submits the Declaration of Raymond P. Fitzpatrick, Jr., annexed hereto as Exhibit B and other exhibits annexed as Exhibits C and D.

Dated: June 9, 1992.

Respectfully submitted,

/s/Raymond P. Fitzpatrick

Raymond P. Fitzpatrick, Jr.
(RF 1705)
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1100 Park Place Tower
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Special Counsel

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Yonkers, New York 10701
(914) 377-6240

CERTIFICATE OF SERVICE

I hereby certify that I have served the above and foregoing Amendment to City of Yonkers' Motion to Vacate or Modify and Motion to Enter Modified Long Term Plan Order by Federal Express overnight delivery, this 9th day of June, 1992, upon the following counsel:

Michael H. Sussman, Esquire
1 Harriman Square
Goshen, New York 10924

Brian Heffernan, Esquire
United States Department of Justice
Civil Rights Division
10th & Pennsylvania Avenue, NW
Washington, DC 20530

Warren J. Bennia, Esquire
507 East 80th Street
New York, New York 10021

Lawrence W. Thomas, Esquire
145 Palmer Road
Yonkers, New York 10701

A courtesy copy has also been served on:

Frederick Turner, Esquire
Town of Greensburgh
P. O. Box 205
Elmsford, New York 10523

/s/Raymond P. Fitzpatrick
Raymond P. Fitzpatrick, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	80 CIV 6761
	)	(LBS)
and	)	
	)	
YONKERS BRANCH – NAACP, *et al.*,	)	
	)	
Plaintiffs-Intervenors,	)	
	)	
v.	)	
	)	
YONKERS BOARD OF EDUCATION, *et al.*,	)	
	)	
Defendants.	)	

MODIFIED LONG TERM PLAN ORDER

On May 28, 1986, the Court entered the Housing Remedy Order ("HRO"). Part VI of the HRO required the defendant City of Yonkers ("City") to submit to the Court a plan for the creation of subsidized housing, in addition to the 200 units of public housing, to be located in east and northwest Yonkers. The City failed to submit a plan. On January 28, 1988, the Court entered the First Remedial Consent Decree in Equity ("First Decree") providing for the implementation of parts IV (public housing) and VI (additional subsidized housing) of the 1986 Housing Remedy Order. With respect to subsidized housing, the First Decree provided for a goal of 800 units of assisted affordable housing to be provided on a mixed use basis with market rate housing developed through private sector initiatives coupled with Mandated Incentives. On June 13, 1988, the Court entered the Long Term Plan Order further implementing the 800 unit

goal of the First Decree and providing for a mix with market rate units on a 80/20 basis.

On June 5, 1991, plaintiff-intervenors moved the Court for entry of an order granting additional relief to require the City to provide for the construction on City-owned sites of 800 units of affordable housing in east and northwest Yonkers. Plaintiff United States supported that motion. On July 8, 1991, the defendant City of Yonkers filed a cross-motion to modify or vacate the First Decree and Long Term Plan Order.

As the Court has made clear on a number of occasions, there is no doubt that the existing Long Term Plan is not working and that modification of the prior orders of the Court is appropriate. The only question is the appropriate remedy.

At a hearing held on July 15, 1991, the Court invited the City to submit a proposed alternative Long Term Plan to meet the objectives of the Housing Remedy Order. The plan submitted thereafter by the City was not acceptable. On September 25, 1991, the Court advised the parties that the Fair Housing Implementation Office ("FHIO") was identifying sites for new construction of affordable housing and seeking to obtain control of possible sites through options. That process continued into 1992.

On February 25, 1992, the Court urged the parties to submit any proposals for modification of the current Long Term Plan to the Court at the time the FHIO submitted its report of available sites.

The Court has received Resolution 83-1992, adopted by the Yonkers City Council on April 14, 1992. The resolution approved the Yonkers Alternative Housing Plan – a document outlining a plan prepared by the City to implement part VI of the Housing Remedy Order. The Plan also recognizes the need to maintain and improve the existing housing stock in southwest Yonkers. Prior to adoption of the resolution, the City sought input from

interested parties, including the United States and plaintiff-intervenors eventually agreed to the plan as modified as the basis for implementation of part VI of the HRO. This Modified Long Term Plan Order is, therefore, entered on the motion of the defendant City of Yonkers.

It is, therefore, ORDERED, ADJUDGED and DECREED:

1. Sections 12 through 18 of the First Remedial Consent Decree in Equity, dated January 28, 1988, and the Long Term Plan Order, dated June 13, 1988, are VACATED. The City is ORDERED to comply with the Modified Long Term Plan as provided for below.

2. *Affordable Housing Goals.* The City shall facilitate additional affordable[1] housing in the four quadrants of Yonkers in accord with the following four year timetable:

(a) During Year 1 (ending June 30, 1993),[2] the City shall provide:

1. 90 newly constructed units of affordable housing in east and northwest Yonkers;

2. 125 units of affordable housing utilizing existing housing stock in east and northwest Yonkers; and

3. 36 units of substantially rehabilitated affordable housing in southwest Yonkers.

(b) During Year 2 (ending June 30, 1994), the City shall provide:

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[1] The term "affordable" is defined in paragraph 12, below.

[2] In the event final Court approval of this Order is not entered until after June 30, 1992 the effective dates in this Order and Plan Years shall be accordingly adjusted to reflect the delay in approval.

1. 115 units of affordable housing utilizing existing housing stock in east and northwest Yonkers; and

2. 36 units of substantially rehabilitated affordable housing in southwest Yonkers.

(c) During Year 3 (ending June 30, 1995), the City shall provide:

1. 25 newly constructed units of affordable housing in east and northwest Yonkers;

2. 110 units of affordable housing utilizing existing housing stock in east and northwest Yonkers; and

3. 36 units of substantially rehabilitated affordable housing in southwest Yonkers.

(d) During Year 4 (ending June 30, 1996), the City shall provide:

1. 100 units of affordable housing utilizing existing housing stock in east and northwest Yonkers; and

2. 36 units of substantially rehabilitated affordable housing in southwest Yonkers.

3. *Reconciliation of Plan Achievement.* In order to ensure that the affordable housing stated above is provided, the City shall comply with the following alternative courses of action as applicable:

(a) At the end of plan Year 2, there shall be a reconciliation of the unit goals for Years 1 and 2[3] with the actual number achieved in each category. If the total number of units required by utilizing existing housing stock in Years 1 and 2[4] is not

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[3] See, subparagraphs 2(a) and (b).

[4] The total goal for Years 1 and 2 of existing housing is 240 units.

achieved at the end of Year 2, the City will add the number of the deficiency to the number of units to be newly constructed during plan Year 3. If, however, the City provides affordable housing in excess of 240 existing units, the amount of the overage will be subtracted from the 25 units of new construction required during Year 3. If the overage exceeds 25 units, the amount of the variance over 25 shall be subtracted from the existing housing goal for Year 3.

(b) At the end of Year 4, the City shall reconcile the total affordable housing units to be provided under this Order with the actual number achieved in each category. If the total number is not achieved, the City will create those units through the prompt issuance of RFP's for new construction within 90 days of the close of plan Year 4.

(c) A unit of existing housing is considered achieved when occupied by a qualified family. In the event the goal for units has not been achieved at the time of reconciliation after either Year 2 or Year 4, the City may be given temporary credit pending completion and occupancy of the unit if no substantial obstacles remain to the utilization of the unit for affordable housing. If the units are not completed and occupied within a reasonable time, any party may move the Court to dissolve said temporary credit.

4. *Yonkers Affordable Housing Corporation.*

(a) The City shall be responsible for the implementation of this Order and creation of the housing provided for herein. It shall have the discretion to provide the housing in such manner as it deems appropriate so long as its actions are consistent with the HRO and this Order. The City has determined to meet its obligations by creating a not-for-profit corporation to be called the Yonkers Affordable Housing Corporation ("YAHC").

(b) The YAHC shall identify and obtain or arrange housing, loans, grants and other resources necessary to implement this Order.

(c) The YAHC shall be governed by a Board of Directors appointed by consensus of the City Council and the Mayor and shall employ a chief operating officer and staff to carry out the day-to-day implementation of this Order.

(d) The City shall have the right to dissolve the YAHC and otherwise succeed to all of the right, title, interest and assets of the YAHC and otherwise directly meet its obligations under this Order without use of the YAHC.

5. *Fair Housing Implementation Office.* Consistent with this Order, the Office shall henceforth be called the Fair Housing Office and shall perform only the following functions:

(a) those delegated to the Office by part II(F) of the HRO specifically pertaining to counseling, educational programs, and implementation of training programs.

(b) provide technical advice, information and consultation regarding work previously done by FHIO to the City and YAHC as requested by those parties;

(c) monitor the compliance of the City and YAHC in meeting the requirements of this Order with respect to the selection of potential homeowners and tenants of affordable housing; and

(d) participate in meetings with the parties as set forth in paragraph 18.

For purposes of budgeting, FHO shall function as a City department and submit a timely budget proposal, consistent with directives from the Mayor's office, as part of the normal City budget process.

6. *New Construction.* The City shall provide newly constructed units of affordable housing on appropriate sites in accord with the schedules provided in this Order. See, "Sites", paragraph 7; and "Goals", paragraph 2. Within 90 days of the entry of this Order the City shall present completed site plans

for the development of the new housing for Year 1 on the Sites. The City shall ensure that all primary builders or developers involved in the construction, development or management of the housing act in compliance with this Order and the approved plans for the Sites. The City shall also ensure that all units meet the criteria applicable to all funding and support programs the City and YAHC elect to utilize in providing the housing.

7. *Sites for New Construction.*

(a) In order to meet the Goals for new construction in east and northwest Yonkers, the City shall utilize the Sites identified below and such others as are necessary to comply with this Order.

(b) The following sites, as identified in the Yonkers Alternative Housing Plan, are approved for new construction:

1. St. James Terrace – approximately 20 townhomes.

2. Cross Street and Tuckahoe Road – approximately 14 townhomes.

3. Fort Hill Road (Via Trenta) – approximately 30 townhomes.

4. Warburton Avenue – approximately 26 townhomes.

(c) The City shall immediately initiate and promptly conduct all appropriate and necessary environmental reviews to ensure compliance with NEPA and SEQRA and to ensure the suitability of the Sites to meet the purposes of this Order.

(d) Upon completion of environmental reviews, the City will promptly enter into negotiations with owners of the Sites to acquire title. If the City has not obtained site control within 60 days of entry into said negotiations, the City shall promptly commence eminent domain proceedings to obtain site control.

(e) In the event it is determined by the City that use of any of the sites listed above is not appropriate or feasible, or that additional sites are needed to meet the requirements of this Order, the City shall utilize suitable substituted or additional sites which are approved by Council resolution.

8. *Existing Housing.* The City, through the YAHC,[5] shall utilize existing housing stock to provide homeownership opportunities to qualified families in accord with the requirements of this Order and the following procedures:

(a) *Long Term Affordability.*

The YAHC will ensure that the units required by this Order will remain affordable for a period of 25 years and that, during this time, with respect to income groups and bedroom mixes, the required number of units is maintained.

(b) *Identification of Available Qualifying Units:*

The YAHC shall be responsible for identifying and maintaining a list of cooperatives, condominiums, duplexes and single family dwelling units available for purchase. Information compiled on each unit by the YAHC shall include: address, size, price and the monthly carrying cost of each unit. The YAHC shall seek to ensure geographic dispersement of units throughout east and northwest Yonkers. To ensure the integrative purposes of this Order to provide assisted housing throughout east and northwest Yonkers, the YAHC shall affirmatively market units in as many locations as possible. In its affirmative marketing effort, the YAHC shall not seek to concentrate large

[5] Nothing herein shall prohibit the City from determining that it should directly perform the functions delegated to the YAHC.

numbers of units at any single location. As a guideline, it is normally expected that an affirmative effort by YAHC to utilize more than 4% of the units at a single location would be contrary to the purposes of this Order to facilitate units at as many locations as possible; however, any homebuyer is free at any time to seek housing assisted pursuant to this Order at any location that qualified housing is available.

(c) *Inspection of Available Homes:*

1. The YAHC shall certify the physical condition of each unit for participation in the Plan before occupancy.

2. In the case of single family or duplex units, the inspection shall include a review of the house to ensure compliance with any applicable state or local building codes or laws as well as a review of the remaining useful life of all structural, mechanical, HVAC, and major systems of the house. The YAHC shall maintain records of each such inspection and make such records available to the prospective purchasers upon request.

3. In the case of cooperatives and condominiums, the inspection will include a specific structural review of the individual unit as well as a more general review of the physical condition of the entire complex and a review of the financial condition of coop corporation or condominium association. The YAHC shall maintain records of each such inspection and make such records available to prospective purchasers upon request.

4. The YAHC shall secure the services of, and be responsible for all charges of, local engineers, architects and other professionals to inspect the homes

and analyze the financial conditions of the homes. The YAHC will encourage the participation of minority and women owned firms in its recruitment of consultants. No home can be purchased hereunder unless it has been found acceptable following all required reviews and inspections.

(d) *Purchase of a Unit by a Qualified Homebuyer.*

1. Potential homebuyers shall apply for eligibility by the submission of application as provided in paragraph 14. The YAHC shall match eligible applicants with available units for which they qualify. After conducting all appropriate reviews the YAHC will provide a qualified family with a list of appropriate and available units in which YAHC has determined it can place said family.

2. The YAHC will provide transportation to assist the family in viewing available units if necessary and requested.

3. YAHC will take those steps necessary to facilitate the purchase by eligible families of units for which they qualify.

4. To the extent required by applicable state law and the rules of the cooperative, the homebuyer must be approved by the Board of Directors or similar body of the cooperative. In addition, sponsor-held units purchased hereunder shall also be approved by the Board of Directors or similar body of the cooperative. The sponsor shall waive any rights it may have not to adhere to the Board approval procedures outlined above. Such Board of Directors or similar body shall not hold a YAHC-assisted homebuyer to any higher or different standard than permitted by law and shall conduct all reviews normally applied by it in reviewing potential homebuyers. If, in the reasonable judgment

of the YAHC, the coop or its board acts in possible violation of local, state, or federal law, the YAHC will refer the matter to the Corporation Counsel for review and, if appropriate, action consistent with the City's fair housing ordinance and other state or federal laws.

5. After the purchase of the home, a YAHC-assisted homeowner shall have all of the rights, duties and responsibilities of other homeowners in the cooperative, condominium or building in which the unit is located.

(e) *Sale of Unit Purchased through the Yonkers Alternative Housing Plan.*

1. During the 25 year affordability period, when a homeowner determines to sell the unit, said homeowner shall notify YAHC and obtain an approved range of resale prices which shall ensure that the unit remains affordable to a family in the same income group as the seller was when it originally acquired the unit. See, paragraphs 11 and 14. Within the approved range of affordable prices, the YAHC shall not control the actual sales price. Should a homeowner receive an offer in excess of the established affordability range, said homeowner may seek permission from YAHC to accept said offer if YAHC determines in its sole discretion to then substitute another unit within the mandated affordability range.

2. Subject to any requirements agreed to at the time the seller acquired the unit[6], if the sales price is greater than the sum of the unamortized balances of the loans on the unit, the seller can retain the difference between the sales price and the sum of unamortized balances of loans.

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[6] Such provisions may include requirements that the seller repay any subsidies received in acquiring or owning the unit.

3. If the sales price is less than the sum of the unamortized balances of the loans on the home, the seller is liable for the difference subject to the conditions of each loan or other agreement made at the time the seller acquired the unit.

9. *Section 8 Certificates and Vouchers.* To provide for the needs of households where the annual income and/or downpayment is insufficient for a purchase under this Order, the City (with the assistance of the Municipal Housing Authority) may facilitate rental subsidies for units in northwest and east Yonkers and also participate in the Fannie Mae Lease/Purchase Mortgage Program and receive credit, as appropriate, hereunder.

10. *Preservation and Improvement of Southwest Yonkers Housing Stock.* The City will facilitate the substantial rehabilitation of 144 units of affordable housing in southwest Yonkers in accord with the goals of this Order as provided in paragraph 2, above. To the extent the City is unable to identify sufficient units in southwest Yonkers appropriate for substantial rehabilitation, the City may, with the agreement of the plaintiff and plaintiff-intervenors, meet the goals with newly constructed units, or, in the absence of such agreement, apply to the Court for an Order permitting such action.

11. *Income Priorities.* The City shall ensure that the 565 units (new construction and existing combined) made available in east and northwest Yonkers (see Goals, paragraph 2, above), shall be provided for otherwise qualified families that, at the time of sale or rental, are in the income groups identified below:

(a) One-eighth (12.5%) of the units for families earning less than 50% of the prevailing Westchester County median income for the applicable size of the family;

(b) Three-eighths (37.5%) of the units for families earning between 50% and 80% of the prevailing Westchester County median income for the applicable size of the family;

(c) Three-eighths (37.5%) of the units for families earning between 80% and 100% of the prevailing Westchester County median income for the applicable size of the family; and

(d) One-eighth (12.5%) of the units for families earning between 100% and 120% of the prevailing Westchester County median income for the applicable size of the family.

The foregoing targeted allocations among income groups may be varied within 1 percent of the portion allocated to each target group, except families described in subparagraph (a) must receive at least 12.5% of the units.

12. *Household Size and Bedroom Mix.* The 565 units to be provided in east and northwest Yonkers shall include a bedroom mix for families of the following sizes:

(a) 7% of the units shall include 1 bedroom.

(b) 62% of the units shall include 2 bedrooms.

(c) 31% of the units shall include 3 bedrooms.

The foregoing percentages may each be raised or lowered 3 percent at the discretion of the City/YAHC.

12. *Definition of "Affordable".* The term "affordable", as used herein, means assisted or subsidized housing units (i) sold at a price entailing a monthly carrying cost (assuming a 10 percent downpayment, a 30-year self-liquidating mortgage, and including principal and interest payments, property taxes, homeowners association fees, but excluding utilities) not exceeding at any time 28 percent of the annual gross income of the household occupying the assisted unit or (ii) rented at a rent (including an allowance for utilities) not exceeding at any time 30 percent of the annual gross income of the household occupying the assisted unit.

13. *Funding and Coordination With Other Housing Programs.*

The City shall identify and obtain the funding and other resources necessary to meet the Requirements of this Order. In all respects, the City and YAHC shall determine the appropriate mix of resources utilized (or not utilized) to meet the Goals of this Order. The City may utilize federal, state and local funds from various available programs, including the CDBG, HOME, Federal Home Loan Bank - Affordable Housing Program, NYS Affordable Housing Program, State of NY Mortgage Agency Program, and Fannie Mae Lease Purchase Mortgage Program, other comparable programs or other governmental housing programs. In addition, the City may seek private sector resources through banks, other not-for-profit institutions, and other sources.

14. *Term; Transfer Restrictions and Occupancy Criteria.*

(a) Affordable housing units shall be the primary residence of the owner/occupants.

(b) All affordable housing units subject to purchase shall have resale limitations (enforced by covenants running with the land, restrictions on registration of title, or any other appropriate legal mechanism approved by the City) which will ensure that for a period of twenty five years from the time of their first sale such housing units are sold or resold only to, and at a price affordable to, a household which is, at the time of re-purchase, in the same income group, as the current owner was in at the time it acquired the unit.

(c) With respect to newly constructed rental units facilitated under this Order, the owner of affordable housing units for rent shall ensure that, for a period of twenty-five years from the time of first rental, such units are affordable to, and are re-rented only to, a household which is, at the time of re-rental, in the same income group, as the current tenant was in at the time it first rented the unit. Affordable units for rental may be converted to units for sale subject, however, to the same ownership eligibility standards as applicable to units for sale for the

remainder of the twenty-five period from original occupancy referred to in the previous sentence.

(d) The affordability and other restrictions on resale and/or occupancy shall not apply to (i) the transfer of ownership of an affordable unit between spouses or former spouses ordered as a result of a judicial decree of divorce or separation agreement (not including transfers to third parties), (ii) the transfer of ownership of a unit between family members as a result of inheritance, and (iii) formerly HUD-insured multifamily projects which, following default on the mortgage, HUD acquires or is mortgagee in possession ("MIP"), to the extent that the provisions are inconsistent with applicable HUD statutes and regulations regarding management or disposition of HUD-owned projects or projects for which HUD is MIP; provided, however, that transfers referred to in clauses (i) and (ii) do not extinguish such restrictions (whatever be the legal mechanism through which the restrictions are enforced) which shall be fully complied with in the event of any subsequent sale or rental of a unit not specifically exempted hereby. An exempted transfer as heretofore provided in this subparagraph shall not toll the running of the twenty-five-year period referred to in subparagraph (b) or (c), above.

(e) Qualified homebuyers may apply for eligibility through the YAHC. The City and YAHC shall have the right to apply eligibility and occupancy criteria substantially of the type set forth in 24 C.F.R. § 960.205 to ensure that the personal and financial background of each potential tenant or owner of affordable units will not be detrimental to the viability of the housing development. Applications received by the YAHC will be submitted to the FHO for review to ensure compliance with governing criteria as well as applicable priorities.

(f) To the extent not inconsistent with other applicable occupancy and financial criteria, the City shall give occupancy priority to:

1) persons who, between January 1, 1971 and the date assisted housing pursuant to this Order is made available, have been residents of public or subsidized housing in the City of Yonkers. Such persons shall be given the first opportunity to apply for such housing, which opportunity shall be afforded up until thirty (30) days following the date the final assisted housing units pursuant to this Order are made available. Occupancy choice from among such persons applying shall be on a first-come, first-served basis;

2) residents of the City of Yonkers; and

3) persons employed in the City of Yonkers.

(g) the City shall accept and screen applications from those who wish to apply for affordable units and maintain a list of such qualified and approved applicants by income grouping, bedroom size, priority and date of application. The YAHC shall select tenants or purchasers from amongst similarly situated economically qualified applicants and match them with available housing in the order of the date of their applications. FHO shall be responsible for monitoring the good faith application of the YAHC's discretion. In the event an eligible applicant shall not qualify for a particular unit or is rejected by a coop board, he or she shall not lose his or her priority.

16. *The Affordable Housing Trust Fund.*

The funds now and hereinafter placed in the AHTF as previously directed by this Court shall be maintained under the control and direction of the City for the purpose of implementation of this Order and shall be expended in a manner consistent with HUD statutes and regulations governing the application of CDBG funds on: (i) site-improvement projects (i.e. site preparation, sewage works, roads, etc.); and (ii) to directly assist in the acquisition of property through the activities of the City and the YAHC; or, (iii) such other expenditures, consistent with HUD statutes and regulations, that will further the overall

objectives of this Order. In no event shall such funds be made available to private developers to defray construction or carrying costs for affordable units.

17. *Monitoring and Compliance.* The City/YAHC shall periodically report to the plaintiffs, with a copy to the Monitor, as set forth below, on their progress in implementing the requirements of this Order and shall timely respond to their requests for pertinent information. The parties shall seek in good faith to resolve concerns and disputes involving the implementation of this Order through conciliation and mediation without direct Court involvement. In furtherance of that goal, the parties shall conduct periodic meetings at City Hall in Yonkers, or such other place as mutually agreed by the parties, through which the parties shall communicate and seek to resolve concerns and disputes in an orderly process. The meetings shall be chaired by a Monitor, appointed by the Court, with the joint approval of the parties. The Monitor shall seek to ensure the orderly resolution of problems encountered in the implementation of this Order. During Year 1, the parties shall meet monthly. Thereafter, they may meet less frequently if agreed by all parties. The meetings shall be attended by counsel for the parties, representatives of the parties, the chief operating officer of the YAHC, the Monitor, the Executive Director of the FHO, and other persons as appropriate. Nothing herein shall limit the right of any party to bring an issue before the Court in the appropriate manner.

Dated: June ____, 1992
New York, New York

SO ORDERED:

_____

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
and	)	
	)	
YONKERS BRANCH – NAACP, *et al.*,	)	80 CIV 6761 (LBS)
	)	
Plaintiffs-Intervenors,	)	
	)	
v.	)	
	)	
YONKERS BOARD OF EDUCATION, *et al.*,	)	
	)	
Defendants.	)	

DECLARATION OF RAYMOND P. FITZPATRICK, JR.

Raymond P. Fitzpatrick, Jr., declares and states under penalty of perjury:

1. I am one of the counsel of record for the defendant City of Yonkers ("City") in the captioned case. I make this Declaration on the basis of my personal knowledge, information and belief and in support of the pending motion to enter the proposed Modified Long Term Plan Order tendered to the Court herewith as Exhibit A to the motion.

2. Since the July 15, 1991 hearing, the City has endeavored to develop a plan to modify the current Long Term Plan requirements to implement Part VI of the 1986 Hearing Remedy Order ("HRO"). The Court has advised the parties from time to time of its interest in receiving a proposed plan, supported by a majority of the City Council of the City of Yonkers, that utilizes an appropriate mix of resources to realistically meet the

objectives of the HRO. See, transcripts of July 15, 1991, September 26, 1991 and February 25, 1992.

3. On April 6, 1992, Yonkers Mayor Terence M. Zaleski, together with the City Council leadership, announced the Yonkers Alternative Housing Plan – a proposed Plan to form the basis for vacation and modification of certain aspects of the 1988 First Remedial Consent Decree in Equity and the 1988 Long Term Plan Order. Prior to announcement of the Plan, the Mayor and other representatives of the City administration had meetings with counsel for the parties, the Executive Director of the FHIO, political, community and civic association leaders, cooperative boards, clergy and other interested persons. The April 6 Plan was constructed in an effort to meet the various concerns raised by those potentially interested persons, as well as concerns expressed by this Court in earlier proceedings, in meeting the requirements of Part VI of the Housing Remedy Order. Copies of the Plan were sent to counsel for the United States and plaintiff-intervenors. The proposed Plan was well-publicized in numerous public meetings after April 6, 1992.

4. Following the announcement of the April 6, 1992 Plan, discussions took place between representatives of the plaintiffs and representatives of the City's administration in an effort to seek an agreement between the parties on the Plan which would form the basis for the modification of this Court's orders. Those discussions involved conversations directly between Mayor Zaleski and the leadership of the Yonkers NAACP and Michael Sussman, attorney for the NAACP. A meeting was held in Yonkers on the evening of April 12, 1992 between representatives of the City and representatives of the Yonkers Branch NAACP during which various concerns regarding the proposed Plan were discussed. Primary among those concerns was the desire of the plaintiffs to include a "backup" provision in the event the City was not able to meet its goals for the development affordable housing through the utilization of existing housing. The purpose of the backup provision was to address the concern of the plaintiffs that the City would be unable to meet Plan goals to utilize existing housing because of the need to obtain approval of coop boards. The plaintiffs took the position that a backup

would ensure that a new construction remedy would automatically be required in the event of a failure to reach goals utilizing existing housing. In addition, there were telephone communications with Brian Heffernan, attorney for the United States regarding this issue. Mr. Heffernan had similar concerns. As of the evening of April 13, the City refused to agree to the plaintiffs' demands for a one-year backup requirement.

5. On the morning of April 14, 1992, a telephone conference took place between representatives of the City and representatives of plaintiff-intervenor NAACP. Participants in the telephone conference included: Kenneth Jenkins, President of the Yonkers Branch NAACP; Michael Sussman, attorney for the Yonkers Branch NAACP; Mayor Zaleski; representatives of the Mayor's office; several members of the Yonkers City Council constituting a majority of the Council; Council aides; and, the undersigned attorney for the City. During the course of that telephone conference, a compromise agreement was reached to increase the number of units and various goals included in the Plan, set up a monitoring procedure, include a backup provision for reconciliation after two and four years, and utilize a 25-year affordability requirement. As a result of that telephone conversation, Mr. Sussman, on behalf of the plaintiff-intervenors, indicated that the parties had reached an agreement. He said: "...we've got a deal." Mr. Sussman further advised that the United States had already advised him of its concurrence with the Plan as agreed to during the telephone conversation with plaintiff-intervenors. The Mayor and majority of the Council further acknowledged, through the undersigned counsel, that the City had agreed to the revised proposal.

6. During the afternoon of April 14, 1992, I had a conversation with Brian Heffernan, attorney for the United States. I outlined for Mr. Heffernan the changes agreed to with Mr. Sussman during the telephone conversation and Mr. Sussman's statement to me that the United States also supported the proposed Plan with the revisions. Mr. Heffernan confirmed for me that the United States had agreed to the revised Plan.

7. Further revisions were made to the Plan document based upon the agreements reached with Mr. Sussman and Mr.

Heffernan during the earlier telephone conferences. The revised Plan document was then incorporated into the proposed resolution and was substituted during the course of the Council meeting. Copies were made available to representatives of plaintiff-intervenors present at the meeting. Resolution 83-1992 was amended to incorporate the revised Plan and was passed by the City Council by a vote of 4 to 3. Representatives of the plaintiff-intervenors were present at the Council meeting and applauded the Council's approval of the revised Plan.

8. On April 15, 1992, a telephone conference was held with this Court and counsel for the City, NAACP, United States, and FHIO. During the course of that telephone conference, I advised the Court that the parties had reached an agreement to modify the Court's Long Term Plan Order and other remedy orders in a manner consistent with the provisions of the Yonkers Affordable Housing Plan as adopted by the Council on April 14, 1992. I outlined the salient provisions of the agreement and Plan for the Court. No party objected to this outline of the agreement. I further advised the Court that the parties would endeavor to construct a proposed order for submission to the Court within two weeks. As we now know, this process has taken a considerable amount of additional time. A copy of the Council's resolution, with the revised Plan, was delivered to the Court's chambers on April 15.

9. During the period subsequent to adoption of the proposed Plan, some representatives of cooperatives expressed concern regarding the impact of the proposed Plan on cooperatives. Counsel for the United States and plaintiff-intervenors have expressed to the City their concern that the City seek to resolve the concerns of the cooperatives. In furtherance of that effort, the City administration has met with coop representatives, received outlines of concerns, and attempted to resolve some of those concerns.

10. The Plan announced by Mayor Zaleski on April 6, 1992, as well as the Plan finally adopted by the Council on April 14, 1992, utilized the same distribution of units among income groups as that utilized in the 1988 Long Term Plan Order. Under

both the 1988 LTPO as well as the proposed modified order, one-eighth of the units are to be provided for persons earning under 50% of the median income, three-eighths are to be provided for persons earning between 50% and 80% of the median income, three-eighths are to be provided for persons earning between 80% and 100% of the median income, and one-eighth of the units are to be provided for persons earning between 100% and 120% of the median income. The 1988 LTPO provides that the applicable median is to be the New York Metropolitan Area median income. In 1988, the applicable median for Yonkers was based on the New York Metropolitan area. In 1990, Congress, by Public Law No. 101-625, separated Westchester County from the New York Metropolitan area region utilized in constructing the applicable median income to identify "low" and "very low" income families. For that reason, the federally funded programs of the City of Yonkers that rely on a median income now utilize the Westchester County median as the appropriate guideline. The Comprehensive Memorandum prepared by the Fair Housing Implementation Office for this Court also utilizes the Westchester County median as the applicable guideline. During the meetings prior to announcement of the April 6 Plan held with counsel for the United States and plaintiff-intervenors, the City advised that it anticipated utilizing the Westchester County median in its proposed Plan.

The Plan announced by the administration on April 6, 1992 indicated that the Westchester County median would be utilized together with the distribution of units among income groups as outlined above. The Plan finally agreed to by the plaintiffs and approved by the Council on April 14, 1992, similarly used the same Westchester County median income. At no time prior to the agreement was there any negotiation concerning the City's proposed use of the Westchester County median as the applicable median in the modified Plan.

11. The utilization of the Westchester County median was a necessary factor in the comprehensive Plan negotiated with the plaintiffs and agreed to by the City. Prior to adoption of the Plan, the City calculated the cost of implementing a plan with the facilitation of affordable housing units to meet Plan

goals utilizing the Westchester County median. Utilization of any other median would involve significant expense not contemplated by the City when it agreed to the Plan. Subsequent to the adoption of the Plan on April 14, 1992, the United States and plaintiff-intervenors sought to modify the applicable median or the distribution of units among income groups. The City has consistently made clear that it will not renegotiate either of these items and will support a plan consistent with that plan agreed to by the parties on April 14, 1992.

12. The proposed Order submitted herewith is designed to implement the Plan approved by the Council and plaintiffs on April 14, 1992. It provides for City facilitation of a total of 709 affordable housing units in all portions of the City of Yonkers. The Plan utilizes a mix of existing housing resources and new construction in east and northwest Yonkers and substantial rehabilitation of existing housing stock in southwest Yonkers. The City is required to obtain the necessary funding and coordinate the complete implementation of the Plan in a period of four years.

13. Under the proposed Order, four sites are designated for new construction to be facilitated during the first year of the implementation of the Plan. In addition, existing housing goals during the first two years of the Plan will ensure the creation of additional affordable housing opportunities in the immediate future. The City has entered into a revised grant agreement with the U.S. Department of Housing and Urban Development to enable the City to receive funds for CDBG Year 14 which may primarily be utilized for the facilitation of City obligations under this revised Plan. Upon court approval, the City expects to seek substantial amounts of additional funds in order to meet the goals of the Plan in a timely manner.

14. On June 1, 1992, the NAACP issued a press release, attached as Exhibit C, stating that it would not support the City plan due to its objections to the Westchester median and alleged coop opposition. Each of those items was addressed in the negotiated settlement. Similarly, on June 8, 1992, Assistant Attorney General Dunne wrote to Mayor Zaleski and advised that

the United States demanded changes in the distribution of units among income groups and a reduction of the backup from two years to one year. See, Exhibit D. Each of these issues was addressed in the settlement. The Order tendered herewith properly incorporates the provisions of the Plan that was approved as a settlement between the City, United States and NAACP. The City, therefore, requests the Court to enforce the settlement and approve the Order. Valid settlements of the sort involved here are enforceable as a matter of federal law. See, *Allen v. Alabama State Bd. of Education*, 816 F.2d 575 (11th Cir. 1987); *Dillard v. Crenshaw County*, 748 F.Supp. 819, 824 (M.D.Ala. 1990).

15. Under any circumstances, the Plan and proposed Order represent an appropriate remedy to meet the requirements of Part VI of the Housing Remedy Order and the issues raised in the effort to modify the 1988 Long Term Plan Order. The Supreme Court has recently opined that in considering a proposed modification principles of federalism and the public interest "require that the district court defer to local government administrators, . . . , to resolve the intricacies of implementing a decree modification." *Rufo v. Inmates of Suffolk County Jail*, 116 L.Ed.2d 867, 891 (U.S. 1992).

In *McGhee v. Granville County*, 860 F.2d 110 (4th Cir. 1988), the appeals court outlined the process a district court should engage in when evaluating a plan tendered by a governmental civil rights defendant in rectifying a constitutional violation by that defendant in the context of a revised electoral process:

> Where, as here, a court has properly given the appropriate legislative body the first opportunity to devise an acceptable remedial plan, *see White v. Weiser*, 412 U.S. 783, 794-95, 93 S.Ct. 2348, 2354-55, 37 L.Ed.2d 335 (1973), the court's ensuing review and remedial powers are largely dictated by the legislative body's response. If the legislative body fails to respond or responds with a legally unacceptable remedy, "the responsibility falls on the District Court,' *Chapman v. Meier*, 420 u.S. 1, 27, 95 S.Ct. 751, 766, 42 l.Ed.2d 766 (1975) (reapportionment case) to exercise its

> discretion in fashioning a "near optimal" plan. *Seastrunk v. Burns*, 772 F.2d 143, 151 (5th Cir. 1985) (same). Where, however, the legislative body does respond with a proposed remedy, a court may not thereupon simply substitute its judgment of a more equitable remedy for that of the legislative body; it may only consider whether the proffered remedial plan is legally unacceptable because it violates anew constitutional or statutory voting rights—that is, whether it fails to meet the same standards applicable to an original challenge of a legislative plan in place. *Upham v. Seamon*, 456 U.S. 37, 42, 102 S.Ct. 1518, 1521, 71 L.Ed.2d 725 (1982). If the remedial plan meets those standards, a reviewing court must then accord great deference to legislative judgments about the exact nature and scope of the proposed remedy, reflecting as it will a variety of political judgments about the dynamics of an overall electoral process that rightly pertain to the legislative prerogative of the state and its subdivisions. *See, Weiser*, 412 U.S. at 795, 93 S.Ct. at 2354; *Cook v. Luckett*, 735 F.2d 912, 920-21 (5th Cir. 1984) (district court's rejection of legislative proposal in § 2 case reversed).

Such a process has been recognized as appropriate in all institutional reform contexts. See, *Missouri v. Jenkins*, 495 U.S. 33 (1990) (school desegregation); *Milliken v. Bradley*, 433 U.S. 267 (1977) (school desegregation); *United States v. Dallas County Commission*, 850 F.2d 1430 (11th Cir. 1988) (voting rights); *East Jefferson Coalition v. Parish of Jefferson*, 706 F.Supp. 470 (E.D.La. 1989) ("deference" is due proposal by defendant in voting case so long as proposal "can be adopted without violence to the Constitution").

16. The City's proposed Order is designed to meet the purposes of the federal law and the Constitution in a manner deemed acceptable to the elected officials of the defendant. The proposed Order does not violate constitutional or statutory rights and will produce an acceptable remedy in the near future. The Order demonstrates the City's resolve to utilize a mix of

resources. The Order designates acceptable sites for the new construction component and is not dependent on private sector initiatives for achievement of new construction goals. With respect to existing housing, the Order creates an appropriate mechanism to facilitate homeownership through the utilization of the current oversupply in a depressed housing market.[1]

17. The plans proposed to date by other parties will not yield tangible results as will the City plan. The NAACP's original proposal to simply build 800 units of affordable housing on publicly-held sites utilizing private sector contractors is completely unrealistic. The recently submitted plan of the FHIO to facilitate up to 3,500 units on a mixed use basis at scores of sites is little more than a slight revision of the original Long Term Plan which all parties have acknowledged is not working. The FHIO's plan will not produce housing for a number of years, is projected to take at least seven years to implement, is largely based on the failed mixed-use concept, and will cause massive disruption in the marketplace.[2] There is no telling what the cost will be to implement FHIO's plan. The FHIO plan gives greater benefit to higher income persons than does the City plan. The unit allocations for new construction are markedly skewed to higher income levels than proposed by the City. The City will comment further on the FHIO plan in further proceedings.

18. The City has committed to provide the funds necessary to make its plan work and complete the process in four years.

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[1] Contrary to assertions of the plaintiffs, the existing housing plan is not entirely subject to the whims of coop boards. The proposed Order permits utilization of single family homes, duplex units, rental units and condominiums to meet the goals of the Order.

[2] The suggestion in the FHIO report that an increase in demand for existing units through subsidized persons entering the market for the units will cause a "disaster" in the market is contrary to elementary economic theory and common sense. The City is shocked by FHIO's alleged concern that utilization of existing housing at a rate greater than 30 units per year will cause a panic in the market. If anything will cause a disaster in the market, it is FHIO's plan to flood the marketplace with newly constructed units on a mixed use basis. Such effort will cause a further depression of the existing housing market.

The equities are clearly in favor of the City's proposal. The City, therefore, seeks entry of its proposed order.
Dated: June 9, 1992

/s/ Raymond P. Fitzpatrick, Jr.

Raymond P. Fitzpatrick, Jr.
Attorney for Defendant
City of Yonkers

Yonkers Branch of the N.A.A.C.P.
P.O. Box 614, Yonkers, N.Y. 10702
(914) 963-3431

For Immediate Release – by fax

6-1-92

The Executive Committee of the Yonkers Branch NAACP has voted unanimously to reject the City of Yonkers' alternative long term housing plan. The vote was taken on Friday, May 29, 1992 after extensive consultation with legal counsel, according to Ken Jenkins, Branch President.

The main basis for the Branch's position were (1) the City's refusal, in four weeks of negotiation, to ensure that income levels applicable to the various tiers of the long-term plan accurately reflect those of the class of plaintiffs which the desegregation suit sought to serve; (2) Yonkers' inclusion of language in its final proposal which apparently sought to appease the cooperative boards and condominium owners and made implementation of the plan less likely and (3) lingering concerns that many NAACP Executive Committee members had that reliance on existing housing would work, particularly in light of the hostility which cooperative boards and condominium owners expressed after the NAACP and the City reached tentative approval of an alternative in the current long-term housing plan.

According to Branch President Jenkins, the Branch has instructed its attorney, Michael H. Sussman, to communicate its objections to the Honorable Leonard B. Sand, the United States district court judge presiding over the Yonkers litigation. The City proposal is to be presented to the Judge on June 2, with comments by other parties by June 16, 1992.

The Branch intends to submit its own proposals for modifications to the existing long term housing order, particularly in light of the recently announced program suggested by the Fair

Housing Implementation Office, directed by Ms. Karen Hill. Mr. Sussman indicated that this submission will be made by June 16, 1992.

For questions regarding this statement you may call Sheila Morris, public relations, or Ken Jenkins at (914) 963-3431.

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Terence M. Zaleski
Mayor
City of Yonkers
City Hall
Yonkers, New York 10701

JUN 8 1992

Re: *United States v. City of Yonkers, New York*

Dear Mayor Zaleski:

I enjoyed meeting with you, Ms. Lomolino, Mr. Manglia, and Mr. Fitzpatrick on Friday to discuss our Fair Housing Act litigation against the City of Yonkers. I believe that all parties have worked hard to come to an agreement which would bring the *Yonkers* remedial process to an equitable conclusion, fulfilling our long sought after goal of equal housing opportunity in your City. Additionally, I am pleased that, after years of arduous and contentious litigation, the City has made a sincere effort—which continues today—to devise a final remedial approach which will enable it to comply with its long-standing constitutional and statutory obligations to carry out a comprehensive housing remedy.

I too, believe that the City of Yonkers should be given the opportunity to chart its own remedial destiny. To that end, we have been receptive to the City's Long Term Plan proposal, and more specifically to the City's desire to satisfy the bulk of its Long Term Plan obligations through the use of existing housing. We have labored heavily over the last months to develop a Long Term Plan modification all parties find acceptable. However, in the process of attempting to translate the City Council's April 14, 1992 Resolution into an order to be submitted to the Court,

some of our concerns have not been resolved and others have increased due to developments of the past few weeks.

First, as we discussed on Friday, use of the Westchester County median income as a benchmark in our view operates as a substantial limitation on the ability of many lower income persons meant to be assisted by the Court's remedy orders to participate in the Long Term Plan process. Conversely, those persons with higher incomes are benefitted, in our view unreasonably, through such use. This is inconsistent with the intent of the 1988 Consent Decree, which relied on the lower New York Metropolitan Area median income as a benchmark. As you are aware, this has been a matter of major concern to the United States and the NAACP since the first day of negotiations over the terms of a proposed order to be presented to the Court. Nevertheless, because of the City Council Resolution and the tie-in of the Westchester median to various state and federal subsidy programs, we have been willing throughout the negotiations to use the Westchester County median income figure, but have proposed various means of reducing the impact that use of this figure will have on those in lower income categories.

In a further attempt to resolve this problem, we suggest that the most appropriate reference point is the median income figure for the City of Yonkers, if such a figure currently is available from the recent United States Census results, or can be agreed upon by the parties. We understand that the Yonkers median is lower than the median for Westchester County, but higher than that for the New York Metropolitan Area. Accordingly, we propose that the Westchester County median income be used as a benchmark, but that the percentages of each income group to be served by the plan should be adjusted to give approximately the same effect as if the City of Yonkers median income figure were used with the existing income group percentages.

Second, throughout this process the City has made clear its strong preference to rely primarily on the use of existing housing, especially cooperative and condominium units, to satisfy its affordable housing obligations. We have been willing to accede to this approach based on the belief that the City had made

substantial inroads with the private groups whose cooperation would be essential to implementing this plan. Recent events cause us seriously to question whether the City will be able to follow through on its stated desire to proceed in this fashion. As you are aware, the plan has been met with vocal opposition from members of cooperative boards. Regrettably, in attempting to appease such opponents of the plan, the City has proposed changes to the draft order which in our view significantly lessen the City's ability to place persons in cooperative units and give hostile boards even greater leeway to subvert the plan.

Moreover, the comprehensive memorandum issued by the Fair Housing Implementation Office of the City of Yonkers on May 6, 1992, casts doubt on the feasibility of such an ambitious existing housing program. We are particularly concerned with the memorandum's assertion that the size and quality of most available cooperative units renders them unsuitable for use in the Long Term Plan.

We remain committed to the proposition that the City should be given this opportunity to implement a remedy primarily based on existing housing. In light of these concerns, however, we believe that the appropriate course of action is to have a reconciliation period after the initial year of the plan, and each year thereafter, rather than only after the second and fourth years of the plan. To do otherwise is to run an unacceptable risk that the long-delayed remedy in this case will be further postponed.

In sum, we very much appreciate the sincere effort and continuing good faith of the City throughout these negotiations. While we cannot agree to the proposed order in its present form, if the City is willing to make the modifications suggested herein, the United States is prepared to support the plan. Please let us know if the City is amenable to the changes suggested above. We appreciate your efforts and we look forward to hearing from you.

Sincerely,

/s/ John R. Dunne

John R. Dunne
Assistant Attorney General
Civil Rights Division

cc: Michael H. Sussman, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	80 CIV 6761
	)	(LBS)
and	)	
	)	
YONKERS BRANCH – NAACP, *et al.*,	)	
	)	
Plaintiffs-Intervenors,	)	
	)	
v.	)	
	)	
YONKERS BOARD OF EDUCATION, *et al.*,	)	
	)	
Defendants.	)	

REPLY DECLARATION OF RAYMOND P. FITZPATRICK, JR.

1. I am outside counsel for the defendant City of Yonkers in the captioned litigation. I make this Reply Declaration in further support of the motion of the City seeking entry of the Modified Long Term Plan Order tendered to the Court on June 9, 1992.

2. The City has reviewed the responsive papers of the United States, NAACP, FHIO and Town of Greenburgh. Submitted herewith are Affidavits on behalf of the City by Mayor Terence M. Zaleski, Council President Vincenza A. Restiano and Deputy Mayor Andrew J. Maniglia.

3. The City's response will set forth in some detail the City's good faith efforts over the past six months to develop a plan for submission to this Court and the basis for various matters

included therein. The City believes it necessary to recount in some detail the process by which the City Plan was developed. This is due to the unwarranted attack on the City's officials by the NAACP. The City finds such attacks especially inappropriate in light of the Court's concern that the development of racial harmony is an important factor in the ultimate conclusion of the school and housing litigation. The City will not again be drawn into a process of attacking the other parties. The City appreciates the recognition by the United States of the City's good faith effort to seek a fair resoultion to the LTP issues.

The City firmly believed that an agreement was reached with the parties on April 14, 1992. See, newspaper clipping attached as Exhibit A. The agreement is restated in the Yonkers Alternative Housing Plan.[1] We regret that a consensus order could not be negotiated. Nevertheless, the City believes its proposed order will meet the requirements of the HRO in a constitutional manner.

4. *Number of Units, Mix and Timetable.* This Court has acknowledged on earlier occasions that it has never judicially determined the appropriate number of units for achievement under Part VI of the HRO. The goal of 709 units was not predetermined. It is simply the total of the number of existing units, newly constructed units and rehabilitated units to be facilitated under the City's Plan. The 709 unit goal of the MLTPO takes into account the available resources, the 4 year timetable, the Court's stated desire for "an appropriate mix" of approaches, and the give and take of the negotiations last April.

The available resources were initially outlined in the OHA's report dated December 12, 1991. That report demonstrated to the City that its prposed timetable for implementation of the existing housing portion of the plan is realistic yet aggressive.

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[1] Contrary to the FHIO's claim, the Yonkers Alternative Housing Plan is before the Court. A copy was tendered to the Court on April 15, 1992. In addition, the YAHP was submitted as Exhibit 5 to the Sussman Affirmation. The City's proposed Order is designed to implement to the YAHP.

FHIO has suggested that only 30 units per year of existing housing should be produced. NAACP suggests 75 units per year is the appropriate goal. FHIO's proffered reason that more stimulation to the market will cause white flight is unsupported by any competent evidence. The NAACP's suggestion is based on mere speculation. The City's goal of 450 units is based on its evaluation of the available resources and the limits of its ability to achieve the goals over a four year period. The City's goals are also based on the costs of subsidizing the units, using a mix of available programs, to the appropriate levels based on the Westchester median income.

The City has included a reasonable new construction goal that is attainable in Years 1 and 3. The City disagrees with the excessive reliance NAAPC and FHIO seek to place on new construction. The United States supports the City's proposed mix. The facilitation of a plan heavily based on new construction program would be a lengthy process and involve far greater complexities than the program proposed by the City. Indeed, FHIO's program projects occupancy of some of its units in 1999. The difficulty in implementing such a program is also demonstrated in the fact that, as of April 15, 1992, FHIO had only one signed option proposal tendered to it by a landowner (in addition to the St. James conditional sales contract). As the Court recognized earlier in these proceedings, facilitation of a new construction program would be a lengthy, time consuming and difficult process. See, transcript, July 15, 1991.

The City has administratively and legislatively determined that, under current conditions, achievement of HRO goals without utilization of the mixed use concept is an appropriate course of action. Such a course is not unconstitutional or otherwise contrary to federal or local law. It is a simpler and less expensive means of permitting the City to rectify the violation found in this Court's earlier judgment. The City plan will provide real housing opportunities on a faster basis than the FHIO program during the first two years. Indeed, even if the City meets only 80% of its 2 year existing housing goal, it will still have facilitated more affordable housing than under the mixed use

program proposed by FHIO. Compare, FHIO *Comprehensive Memorandum*, Vol. 2, p.12 (353 units after 2 years); with City MLTPO at ¶ 1(a) and (b) (402 units after 2 years). Moreover, it is doubtful, given the complexities of facilitating the 869 total units needed to meet FHIO's initial two year goal, that FHIO would achieve such goals in a timely manner. There is, therefore, no basis for requiring the City to facilitate a plan of the magnitude, cost and burden as that proposed by FHIO. Moreover, none of the parties have endorsed FHIO's approach to the remedy.

FHIO criticizes the City's Plan to substantially rehabilitate units in southwest Yonkers rather than engage in new construction. The decision to provide rehabilitated, rather than new, housing in the southwest was made at the NAACP's request. The City Plan allows the City the option to go to new construction if the rehabilitation approach proves unworkable.

5. *Reconciliation*. The two year reconciliation provision in ¶ 3 of the MLTPO represent a realistic mechanism to measure the City's compliance with the goals of the Order. The two year reconciliation was agreed to by the City as a demonstration of its resolve to make the existing housing plan work.

The language governing the determination of goal achievement, ¶ 3(c), was carefully negotiated and represent a consensus of the parties. The City's proposed Order makes clear that the City would receive credit only if "no substantial obstacles remain to the utilization of the unit for affordable housing." Certainly if a coop board repeatedly rejected qualified homebuyers, that would be a substantial obstacle to utilization of those units for affordable housing.

The annual reconciliation provision requested by the United States is unduly burdensome, punitive and fails to acknowledge the difficulties in developing affordable housing. The City should be allowed the flexibility of a two year reconciliation.[2]

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[2] The two year period is only the time allowed before the reconciliation provision becomes effective. If the City is not properly discharging its responsibilities under the Order, nothing precludes a party from bringing such matters to the attention of the Court. The notion that the Plan can be used as a 2 year hiatus is simply wrong.

6. *FHIO.* A central motivating factor in the City's adoption of the Plan and proposed Order is the effort to regain City control over the implementation process. FHIO has gone to great lengths to revisit the history of the remedial process in this litigation in an effort to convince the Court not to allow the City to control the process of implementation of the remedy. It has always been a central premise of the City's position that the City should control the appropriate implementation of a revised LTP. See, Exhibit B to Zaleski Affidavit. With the City implementing the remedy – much like the Board of Education has implemented the school orders – there will no longer be a need for an active Implementation Office.

The City's proposed Order returns FHIO to its original fair housing office functions under part II(F) of the HRO. The City, as the party responsible for the implementation of the Order, is charged with the duty of receiving and processing homebuyer applications. At the same time, the Office retains a role in the process in monitoring the City's compliance with the governing selection criteria. See, MLTPO, ¶ 5(c). Given the City's obligation to place the homeowners in the housing, it is most feasible to centralize all selection functions in one office and have the FHO simply monitor the City's compliance.

The United States, NAACP and FHIO object to permitting the City to receive applications and prescreen applicants to determine appropriate priorities. None of those parties have submitted any evidence suggesting that the City is not capable of properly discharging those responsibilities. There is no basis to divest the City from this portion of the process and place that function in an office that reports to the Court.

The United States' proposed order provides that the Office shall continue to "provide technical advice, information, and consultation to the City, YAHC and the plaintiffs." That language – providing for advice to the plaintiffs – was never previously proposed by the United States or NAACP and represents a significant expansion of FHIO's activities from that contemplated in the Plan approved on April 14, 1992. Recognizing

that FHIO has developed a significant amount of information and expertise regarding local housing resources, the City's proposed Order makes clear that the City should draw on those resources "as requested by [the City and YAHC]." There is no demonstrated basis for FHIO to continue performing duplicate functions to those performed by the City in the implementation process in order to serve as an advisor to the plaintiffs.[3] Similarly, there is no need for the language suggested by the United States vesting FHIO budgetary authority in the Court.

FHIO strongly urges the Court to reject the City's proposal to facilitate the housing through the Yonkers Affordable Housing Corporation because that entity will be appointed by the City's elected leadership and therefore will be subject to political control. There is no question that the YAHC is designed to be under City control. That is exactly the point of the Plan. The City believes that it can best implement its Plan. While Yonkers was found liable for segregative practices in 1985, that does not mean it is due to be stripped out of its authority to manage its own affairs. The current City government has made clear its desire to promptly implement a fair remedy, which the United States has recognized. The City's record over the past six months is unassailable. Principles of comity and federalism make clear that the City's effort to rectify the violation should be subject to deference.

7. *Dispersion of Units.* The City's proposed Order provides that "in order to further the integrative purposes of this Order to provide assisted housing throughout east and northwest Yonkers, the YAHC shall affirmatively market units in as many locations as possible." MLTPO, ¶ 8(b). The United States included this language in its proposed Order. The City went on to explain how that affirmative marketing obligation should be implemented by providing a *guideline* that a YAHC effort "to utilize more than 4% of the units at a single location would be

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[3] FHIO's recitation of the duties outlined to it at the April 16, 1992 meeting among counsel is erroneous. FHIO was told at that meeting that the parties contemplated continuing services from the Office in fair housing functions, a monitoring role, a tenant screening role and assistance to the City to build on the resources and technical data already compiled by the Office.

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IN THE

Supreme Court of the United States

October Term, 1994

CITY OF YONKERS,

Petitioner,

vs.

UNITED STATES OF AMERICA and
YONKERS BRANCH, NAACP, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

OPPOSITION TO GRANT OF WRIT OF CERTIORARI

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IN THE
Supreme Court of the United States

Docket No. 94-608

CITY OF YONKERS,

Petitioner,

vs.

UNITED STATES OF AMERICA and
YONKERS BRANCH, NAACP, et al.,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO GRANT OF WRIT OF CERTIORARI

I. INTRODUCTION - THE DECISIONS BELOW

Without any compelling basis or a showing that the proposed matter conforms with any of the traditional standards for the grant of its Petition, the City of Yonkers has again asked this Court to review a decision of the lower courts.

a. The district court's decision

On this occasion, Yonkers challenges the district court's (a) factually-based rejection of its motion for a modification of the long term housing plan and (b)

appointment of a Special Master to oversee implementation of the long-delayed long term housing remedy program.

Nearly nine years after the district court's landmark liability decision, *United States v. Yonkers Board of Educ. et al.*, 624 F.Supp. 1276 (S.D.N.Y. 1985), and due in substantial measure to ongoing municipal recalcitrance, only four units of affordable integrated housing have been provided to members of the class the NAACP represents. Contrary to the exaggerated representations of petitioner, unfortunately, the current municipal government has not operated in good faith and, instead, burdened its own alternative housing proposal in such a manner as to make it unfeasible and meaningless. The district court properly rejected the City's approach. And, faced with years of delay and continued politicization of this matter by municipal officers, the district court wisely appointed a Housing Special Master to coordinate implementation activities.

The district court properly used its discretion in rejecting central aspects of the city's "alternative" remedial approach. That approach over-relied on using existing housing for low and moderate income families. It did not reasonably promise to work and the City's own expert witness so conceded. Additionally, the district court found that the City proposed to under-utilize several sites agreed by all parties to be suitable for the construction of new affordable housing units. This approach, Judge Sand reasoned, would use up scarce land without appropriate return and the district court rejected this chicanery.

b. The Court of Appeal's decision

In its per curiam decision dated July 5, 1994, the Court of Appeals for the Second Circuit affirmed all aspects of the district court's decision. Citing *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S.1, 15 (1971), the Court first noted that the district court judge has had considerable

first-hand experience with the parties and is to be given broad discretion in fashioning a constitutional remedy.[1] The district court must determine whether the local government has fashioned a remedial plan that "promises realistically to work and promises realistically to work now." *Green v. County School Board of New Kent County, Va.*, 391 U.S. 430, 439 (1968) (emphasis in original). Here, upon finding the City's plan ineffectual, the Second Circuit panel reasoned, the district court was obliged to reject it in favor of a more realistic and grounded alternative which would rapidly remedy the long-adjudicated constitutional violation.

Nor, the Second Circuit held, could Yonkers complain that it was not provided an opportunity to demonstrate the efficacy of its alternative approach--concentrating on meeting its remedial obligations by using existing housing units. Instead, the record below made clear that, during the ten month trial period (July 1992-May 1993) the district court explicitly provided to determine whether Yonkers' approach would work, petitioner placed not a single family in such an existing housing unit. In this light, the district court would have abused its discretion in accepting Yonkers' empty promises that its plan would work, by some indefinite future occasion.

The Second Circuit next noted the well-established power of the federal courts to appoint Special Masters, especially where, as here, the district court retained specific authority to review any action proposed by the Master with which Yonkers disagrees. Faced with Yonkers' obstructive conduct in implementing even its own "alternative" long term housing plan, the district court "fairly concluded that a 'system which relies on consensus and mediation' has

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[1]The Honorable Leonard B. Sand has presided over all phases of this case since its filing in December 1980.

proven unreliable and ineffectual to integrate Yonkers." (A-7). The Court of Appeals finally endorsed the district court's conclusion that "effective desegregation requires a more centralized control in a single individual immune to the political pressures which have compromised the City's most recent effort at compliance." Id.

II. REASONS FOR DENYING THE PETITION

This Court should not expend its scarce resources to review this case.

1. In our appellate system, the district court makes findings of facts, subject to a clearly erroneous standard on appeal. This Court does not engage in fact-finding or disturb factual findings made below with record support.

Accordingly, the finding by Judge Sand that Yonkers plan would not remedy the constitutional violation must be respected and, with that, there is nothing for this Court to review. In January 1988, Yonkers agreed to a goal of 800 units of affordable housing to remedy the adjudicated constitutional violation. Nearly seven years later, four units have been provided. The district court has determined, as a matter of fact, that Yonkers' officials obstructed the only private concern which has made a concrete proposal to build affordable housing in East Yonkers since 1988 on "pretextual" grounds (A-72). The district court also concluded, as a matter of fact, that at most, during the next four years, Yonkers might be able to place 250 families in existing housing units and that Yonkers' officials had capitulated to racist political pressures in implementing their own alternative housing plan (A-57-58). Finally, Yonkers had proposed to construct a total of 115 units of new construction during the succeeding four years, the district court properly rejected the City's alternative plan as not meeting the remedial goal already established as "law of the case."

In its Petition, the City seeks to re-argue factual

matters properly considered and disposed of below. Mayor Zaleski, Judge Sand found, did not make good on his promise to comply with the 1986 Housing Remedy Order; rather, he proposed a plan which did not promise realistically to remedy the adjudicated constitutional violation and then specifically surrendered implementation of the existing housing program to racist elements who wished to exclude as many minorities from East Yonkers as possible (A-57-58).

The City also distorts history in asserting that either the United States or the NAACP "joined in support of the Plan." On the contrary, the NAACP denounced the plan as one tailored for persons earning incomes substantially in excess of the intended beneficiaries of the 1988 Long Term Plan order and called for increased densities at identified housing sites and less reliance on existing housing.

Likewise, in attempting to blame the Fair Housing Implementation Office for its failure to place families in existing housing during the trial period, the City distorts the findings of fact made below. Judge Sand gave the city the "green light" to go forward with its proposed plan (A-53). Instead of proceeding in a logical manner, the City did not conduct independent studies of the financial capacity of buildings it hoped to induce low and moderate income families to buy into. It instructed brokers working with it not to cooperate with FHIO. It appeared to the district court that the City's "almost . . . primary concern [was] in fixing blame on FHIO rather than moving the project forward." (A-55).[2] The Mayor established a cap of 4% affordable

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[2]Much of the City's current petition is a re-hash of arguments discredited below. For instance, Penn & Schoen found that most families on FHIO's waiting list had not been referred to housing or visited affordable housing. This was the case because no such housing was yet available, not through any fault of FHIO's.

housing units/building, thus making it practically impossible to purchase sponsor-held units (A-56-57). He also committed, contrary to New York State law, to submit the names of persons who purchased units from sponsors for approval to cooperative boards (A-58). The City did not consummate a necessary "risk-sharing" agreement with SONYMA, a state financing agency, this making illusory adequate funding for the acquisition of apartment units (A-59).

In short, as a finding of fact, not now reviewable and amply supported, Judge Sand concluded that "Yonkers Alternative Housing Plan . . . does not seek to maximize [the use of existing housing] because of self-imposed inhibitions." The court specifically concluded that "if the City continued on the present procedures in implementation of the Yonkers Alternative Housing Plan, it would be incapable of producing more than a handful of units per year." (A-60).

2. The City contends that the lower courts disrespected the principles of federalism. The City is flat out wrong. The district court may not defer to local interests and sacrifice constitutional rights when it has concluded that a violator's proposed remedial plan is illusory and shall not work. This is such a case. Yonkers is not and has not been ready, willing and able to comply with the Constitution. Thus, the City's reliance on *Missouri v. Jenkins,* 495 U.S. 33 (1990) is wholly mistaken. Proper respect for local government cannot be an excuse for further delaying the vindication of constitutional rights. Yonkers' assertions that its plan would work were thoroughly examined below and rejected.

The district court here not only gave local officials an opportunity to formulate a plan on paper. Judge Sand allowed Yonkers ten months to implement its plan and its produced no results. Judge Sand did not reject Yonkers' plan out of preconception or on the basis of abstraction.

Yonkers' own expert could not predict that the plan would yield the number of units established five and one-half years before as the agreed remedial objective.

3. Yonkers would have this Court reject *Green v. County School Board of New Kent County, supra,* and fashion a new test for assessing the remedial plans formulated by constitutional wrongdoers. The standard would no longer be whether the district court found, after review, that the plan promised to expeditiously eliminate the constitutionally offensive condition. The new standard would be whether the remedial plan was itself unconstitutional or "in any way violative of federal law." (City Petition at 17). But, these are not appropriate or applicable legal standards: the issue is whether the district court views the municipality's effort as genuine and calculated to cure the offensive condition. Here, the district court made factual findings to the contrary and these doom the City's current argument.

4. Yonkers argues next that the district court had to choose the "least intrusive remedy." This is preposterous. Yonkers was found to have violated federal statutory and constitutional laws nearly nine years ago. 624 F.Supp. 1276 (S.D.N.Y. 1985). The Court of Appeals affirmed that decision in all respects and this Court denied review. 837 F.2d 1181 (2nd Cir. 1987), cert. denied, 486 U.S. 1055 (1988). Yonkers cannot be equated with a community which has never had the opportunity, after a finding of constitutional violation, to fashion a remedy. Indeed, in early 1986, Judge Sand gave Yonkers precisely that option, but the City refused even to submit a remedy plan for consideration. And, contrary to the factual distortions Yonkers now submits, the current administration has capitulated to the same racist pressures in hamstringing the alternative housing plan.

5. This Court also should deny review to the City's objection to the appointment of a Special Housing Master, a

course first advocated by the NAACP in 1990. Appointment of such a Master is consistent with Federal Rule of Civil Procedure 53(b), this Court's precedent and common sense. Special Masters have diverse roles, not merely that of a monitor. In the Cleveland School desegregation case, for instance, the Master reorganized the district's business operations so as to free up funds for desegregation-related activities. Here, the Master is responsible for making recommendations to the district court with regard to such subjects as housing counselling; the optimal development plan for specific housing sites, as well as the most qualified developer. The modified remedy order explicitly contemplates substantial input from all parties, including Yonkers, in the work of the Master and she has so operated.

In describing the Master's role, Yonkers is apparently not content to rely on the facts. Contrary to its representation, the Master does not "select the preferred developer." Rather, the parties, including Yonkers' representatives, meet to discuss the submitted proposals and evaluate each. If no consensus emerges, the Master makes a recommendation to the district court; any party, again including the City, may challenge the recommendation. The City's claim that it only can "dissent" from this recommendation is unfair: it can file a motion on any dispute at any time and the Order carefully protects its due process rights entirely.

6. Finally, the record here demonstrates that while publicly proclaiming support for compliance with housing orders, Yonkers has continued to obstruct their implementation. The single private developer which proposed to build affordable housing in East Yonkers was defeated by a set of pretextual, racist arguments at the Planning Board level. The district court found that this administration impeded its own implementation of the Alternative Housing Plan due to the opposition of white

residents of East Yonkers who had organized the Yonkers Condominium and Cooperative Council. The City's new construction plans sought to minimize the density of site design and to insulate future residents, not integrate them with their neighbors. In each of these regards, the district court made specific findings of fact which clearly and amply refute Yonkers' current contention that the current administration is "pro-compliance" or genuinely committed to reversing the pattern of racial discrimination it unfortunately inherited. In this context, appointing a Special Master was necessary and critical. The district court did not abuse its discretion in so proceeding and this Court is requested respectfully to decline the City's Petition.

Respectfully submitted,

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(3)

No. 94-608

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In the Supreme Court of the United States

OCTOBER TERM, 1994

CITY OF YONKERS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in failing to adopt petitioner's proposed remedial plan.

2. Whether the district court abused its discretion in appointing a special master to oversee the implementation of the remedy.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 29 F.3d 40. The opinions of the district court (Pet. App. A51-A65, A66-A95, A97-A108) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 1994. The petition for a writ of certiorari was filed on October 3, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(c).

STATEMENT

1. Following a lengthy trial in 1983 and 1984, the district court found that petitioner had unconstitutionally segregated its housing by relegating virtually all subsidized housing to the southwest part of the City. Pet. App. A3. To remedy that violation, the court ordered petitioner to develop a plan for the immediate placement of 200 units of public housing in East Yonkers. Pet. 3. The remedial order also required petitioner to establish a Fair Housing Office to help administer a fair housing policy. Pet. App. A3. Finally, the court ordered petitioner to adopt a long-term plan for the creation of additional subsidized housing in the east and northwest part of the City. *Ibid.* The present petition relates to that long-term plan.

In January, 1988, the parties negotiated a consent decree in which petitioner agreed to create 800 units of subsidized housing by 1992. Pet. App. A3. Almost immediately, petitioner sought to undo the agreement and refused to implement it. In June, 1988, the district court required petitioner to take specific actions to carry out the long-term plan. *Ibid.* The court also expanded the role of the Fair Housing Office and renamed it the Fair Housing Implementation Office. *Ibid.*

Over the next three years, petitioner failed to implement the long-term plan. In June, 1991, plaintiff-intervenor, NAACP, moved for an order requiring petitioner to implement the long-term plan. Pet. App. A3. In response, petitioner moved to vacate or modify the consent decree and the long-term plan. *Ibid.*

At the district court's invitation, petitioner proposed an alternative to the long-term plan in 1992. Pet. App. A4. Petitioner's plan set a goal of 709 units of subsidized

housing, with 450 units coming from existing housing and the rest from new construction or renovation. *Ibid.* The court gave petitioner eight months to work with the Fair Housing Implementation Office to demonstrate that its plan would be effective. *Ibid.*

In June and July of 1993, the district court held a hearing on petitioner's plan. The court found that experience demonstrated that petitioner's use of existing housing "could not realistically achieve even a small percentage of the 450 units it projects." Pet. App. A4. The court also found that disharmony between petitioner and the Fair Housing Implementation Office and political pressures exerted on petitioner had substantially impeded petitioner's progress during the trial period. *Ibid.* The court further found that petitioner's plans for new construction were also inadequate. *Ibid.* The court specifically criticized the plan because it made inefficient use of the proposed sites and because it failed to include any alternatives to owner-occupied town houses, such as rental units. *Ibid.*

The district court then adopted a supplemental remedial plan that resembled a plan submitted by the Fair Housing Implementation Office. Pet. App. A4. The court's plan sets a goal of 250 units from existing housing, rather than the 450 units proposed by petitioner. *Ibid.* The court also appointed a special master to supervise the implementation of the remedy. *Ibid.*

2. The court of appeals affirmed. Pet. App. A1-A7. The court held that the district court did not abuse its discretion in rejecting petitioner's remedial plan, "particularly in view of the eight years that have elapsed since the [original remedial order] was entered." *Id.* at A4. The court rejected petitioner's claim that the district court's failure to adopt petitioner's plan violated

principles of federalism. The court explained that "a proper respect for the principles of federalism does not require a court to adopt wholesale the local government's choice of remedies." *Id.* at A5. A district court also has an obligation to ensure that a plan proposed by local authorities "promises realistically to work, and promises realistically to work *now*." *Ibid.* (quoting *Green* v. *County Sch. Bd.*, 391 U.S. 430, 439 (1968).

The court of appeals noted that the district court had "invited the City's alternative proposal, gave the City eight months to demonstrate its feasibility, and held a ten-day hearing on its merits." Pet. App. A6. Following that hearing, the district court "retained those aspects of the City's plan it found realistic and effective, and jettisoned those it found unrealistic and unfeasible." *Ibid.* The court concluded that "[t]his was a proper exercise of [the district court's] authority." *Ibid.*

The court of appeals also held that the district court did not abuse its discretion in appointing a special master to implement the remedy. The court noted that "[t]he remedial phase of this litigation has now dragged on for eight years, producing few tangible results." Pet. App. A7. It further observed that during the eight-month period in which petitioner was attempting to demonstrate the effectiveness of its plan, petitioner had failed to work effectively with the Fair Housing Implementation Office and had allowed political pressures to interfere with its ability to implement an effective remedy. *Ibid.* The court therefore saw "no basis to disturb [the district court's] conclusion that effective desegregation requires a more centralized control in a single individual immune to the political pressures which have compromised the City's most recent efforts at compliance." *Ibid.* The court added that petitioner would continue to have an important role in imple-

menting the remedy because the district court's order required the special master to work with petitioner and because petitioner could appeal decisions made by the special master to the district court. *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 14-24) that principles of federalism required the district court to defer to petitioner's remedial plan. That contention is without merit.

In exercising its remedial authority, a district court is required to take into account the interests of state and local authorities in managing their own affairs. *Milliken* v. *Bradley*, 433 U.S. 267, 280-281 (1977). That principle applies not only when a federal court adopts its initial remedy but also when the court decides to modify its remedy in light of changed circumstances. *Rufo* v. *Inmates of Suffolk County Jail*, 112 S. Ct. 748, 764 (1992). As the court of appeals held, however, "a proper respect for the principles of federalism does not require a court to adopt wholesale the local government's choice of remedies." Pet. App. A5. A federal court has a duty to provide an effective remedy to those whose rights have been violated. *Davis* v. *Board of Sch. Comm'rs*, 402 U.S. 33, 37 (1971). Accordingly, a court may adopt a remedial plan proposed by a local government only when the plan "promises realistically to work, and promises realistically to work *now*." *Green*, 391 U.S. at 439. When a local government fails to submit such a plan, a federal court is obligated to adopt its own remedial plan. *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971).

The district court followed those remedial principles. The district court first issued its remedial order in 1986. Over the next five years, petitioner resisted implemen-

tation of the remedy. Exercising unusual patience, the court then urged petitioner to propose an alternative remedy. Petitioner finally proposed a remedy in 1992 that relied heavily on the use of existing units. When questions were raised about the effectiveness of such a remedy, the district court gave petitioner a trial period of eight months to show that such a remedy could be effective. At the end of that period, the district court held a ten-day hearing. Based on the evidence introduced at that hearing, the court found that petitioner's remedy would not be effective. The court specifically found that petitioner "could not realistically achieve even a small percentage of the 450 units it projects." Pet. App. A4. The court also found that petitioner's plan for new construction was demonstrably inadequate. *Ibid.*

Thus, the district court gave petitioner every opportunity to devise and implement its own remedy. Experience showed, however, that petitioner's remedy did not realistically promise to work. In those circumstances, the district court was fully justified in rejecting petitioner's proposed remedy and adopting instead a remedy that promised to be more effective. Petitioner's contrary view ignores the district court's findings and the history of this case.

2. Petitioner contends (Pet. 24-30) that the district court abused its discretion by appointing a special master to supervise the implementation of the remedy. That contention is also without merit. Federal courts have inherent, equitable power to appoint a special master to supervise the implementation of their decrees, see *Ex parte Peterson*, 253 U.S. 300, 312-314 (1920), and may properly do so where local authorities have been unable or unwilling to implement a court-ordered remedy, see, *e.g.*, *Morgan* v. *McDonough*, 540 F.2d 527, 533-534 (1st Cir. 1976) (court affirms district court's

appointment of receiver to implement desegregation order), cert. denied, 429 U.S. 1042 (1977). That was the situation here.

Petitioner does not deny that for years it actively resisted implementation of any remedy. Rather, it asserts (Pet. 28) that it has become more cooperative recently. In deciding what measures were needed to ensure that the judicial remedy would be implemented, however, the district court could properly consider petitioner's history of noncompliance. The court could also properly consider the fact that, during the eight-month demonstration period, petitioner continued to allow political pressure from outside interest groups to interfere with the implementation of an effective remedy. Pet. App. A4. Finally, the district court could also properly take into account the fact that "[t]he remedial phase of this litigation has now dragged on for eight years, producing few tangible results." *Id.* at A7. In light of those extraordinary circumstances, the district court acted well within its discretion in appointing a special master to supervise the implementation of the remedy.

Petitioner contends (Pet. 29-30) that the district court's order intrudes too deeply into petitioner's legitimate prerogatives and that the special master should have been given the more limited role of monitoring compliance and facilitating the interaction of the parties. Given the circumstances in this case, however, the district court reasonably determined that "effective desegregation requires a more centralized control in a single individual immune to the political pressures which have compromised the City's most recent efforts at compliance." Pet. App. A7. Moreover, as the court of appeals noted (*ibid.*), petitioner will continue to play an important role in the implementation

of the remedy. Under the district court's order, the special master is required to work with petitioner. And while the special master has the power to resolve disputes between them, petitioner has the right to appeal any adverse decision to the district court.

Petitioner contends (Pet. 28-29) that the decision below conflicts with the decisions in *United States* v. *City of Parma*, 661 F.2d 562 (6th Cir. 1981), cert. denied, 456 U.S. 926 (1982), and *Newman* v. *Alabama*, 559 F.2d 283 (5th Cir. 1977), cert. denied, 438 U.S. 915, cert. granted in part and rev'd in part on other grounds *sub nom. Alabama* v. *Pugh*, 438 U.S. 781 (1978) (per curiam). There is, however, no such conflict. In *City of Parma*, the Sixth Circuit held that it was an abuse of discretion to appoint a special master to administer a remedy when less intrusive means would be equally effective. 661 F.2d at 578-579. Similarly, in *Newman*, the Fifth Circuit held that it was an abuse of discretion to appoint a 39-member committee to monitor the remedy when a single monitor would do. 559 F.2d at 289-290. By contrast, in this case, the district court determined, based on the evidence before it and the history of this litigation, that effective desegregation required the appointment of a special master with the power to supervise the implementation of the remedy. Less intrusive measures, the court concluded, would not suffice. *City of Parma* and *Newman* are therefore inapposite.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 94-608

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CITY OF YONKERS,

Petitioner,

vs.

UNITED STATES and YONKERS BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

In opposing certiorari, respondents United States and NAACP have failed to squarely address the issues of federalism and remedial authority raised by the petition of the City of Yonkers ("City"). First, respondents refuse to accept the fact that in evaluating a proposed remedial plan, a good faith workable proposal of the municipal defendant is entitled to deference. Second, they urge this Court to allow lower courts broad discretion to usurp local administrative functions with a Special Master. Both notions are clearly contrary to accepted principles of federalism that constrain a district court's remedial authority.

1. Respondents claim that the notion of deference to a plan proposed by a municipal defendant is without merit. U.S. Opposition at 5; NAACP Opposition at 6. They erroneously claim that the district court found that Yonkers' remedial plan would not work and it was therefore free to fashion its own plan.

The district court made no such finding. The district court found that: (1) certain revisions to the existing housing component of the plan would increase its effectiveness; and (2) with such revisions it would approve the existing housing plan with a 250 unit goal. A-99. The City did not oppose those revisions to its existing housing plan. But, the district court never found that the core of the City's Plan – heavy reliance on existing housing – simply would not work. A-53, 99.

The real issue, which is entirely unaddressed by respondents, is the effort by the district court to micro-manage urban planning in Yonkers through the 550 unit high density new construction program under the direction of a bureaucracy created by the district court. The City proposed lower density town home projects where the beneficiary class could achieve

the goal of home ownership in integrated neighborhoods. The district court never found that such an approach was unworkable; rather, it preferred the high density mid- and high-rise projects proposed by its own agency, the Fair Housing Implementation Office, with the support of the plaintiffs.[1] The notion of deference played no role in the district court's evaluation of the City's new construction proposal.

Respondents turn a blind eye to the district court's substitution of itself for the lawful planning authorities of the municipal defendant. The failure of the lower courts to require deference to the City's unquestionably workable approach to construction of new remedial housing warrants correction by this Court.

2. Respondents claim the district court is justified in appointing a Special Master with broad administrative authority over the day-to-day of implementation of the remedy because of the length of time that has passed and "petitioner's history of noncompliance." U.S. Opposition at 7. Again, respondents ignore the unrebutted record of the efforts of the City of Yonkers to resolve this litigation and hasten the day when federal jurisdiction may be terminated. The City has supported appointment of a monitor. Respondents simply offer no adequate justification to vest *administrative* control in a Special Master.

Since the resolution of the crisis of 1988, *see Spallone v. U.S.*, 493 U.S. 265 (1990), there is no evidence of "noncompliance" by the City in the implementation of the Long Term

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[1] There could be no suggestion that the City's new construction program was unworkable. The district court credited the success of the City-sponsored Trinity Court town home project on the west side of the Yonkers. A-86. The City Plan proposed to replicate that successful model on the east side of Yonkers.

Plan component of the Housing Remedy Order. The district court and all parties acknowledged as early as 1990 that the private-sector driven Long Term Plan Order simply was not working because of the downturn in the real estate market of the late 1980's.[2] There has never been a dispute that some modification to the 1988 Long Term Plan Order was necessary. Respondents' worn out claim that the district court has unlimited authority due to recalcitrance of past governments of the City some six years ago is simply unavailing. There is no finding here of current recalcitrance or obstruction to justify appointment of a Special Master with day-to-day administrative authority over the implementation of the remedy.

Since the filing of the City's petition on October 3, 1994, the Housing Special Master's bureaucratic control over the remedy has grown. The Special Master currently has several staff members that devote major portions of their time to this project (at staff rates of $125 hour), an in-house lawyer working on the project, and has now hired her own outside New York counsel. Monthly bills from the Special Master to the City now exceed $40,000 per month on some occasions. Meanwhile, the other components of the district court's bureaucracy – such as the $500,000 annual cost for the Fair Housing Implementation Office – go on. There is no end in sight to these costs and rivalries between these bureaucrats are growing.

In 1992 the City moved the Court to approve a comprehensive plan that the City would fully implement by early

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[2] The claim of the United States that the City was responsible for failure to implement the Long Term Plan over a three year period is wrong. U.S. Opposition at 2. Implementation of the original plan was vested in FHIO, an agency responsible to the district court.

1996. Had the district court approved the City's proposed order, we would be nearing the end of that process and hundreds of families would now be enjoying the benefits of a remedy. But, the district court rejected the City approach and has vested control in an unwieldy and expensive court-controlled bureaucracy that – despite the expenditure of millions of dollars in public funds – has produced no significant results. Intervention by this Court is necessary to redefine the boundaries of a district court's authority to create and supervise a bureaucracy to carry out its orders. If there was ever a case that was ripe to present such an issue, this case is it.

CONCLUSION

Petitioner City of Yonkers respectfully requests this Court to grant its petition for writ of certiorari, vacate the orders of the lower courts, and remand this cause for further proceedings.

Dated: February 28, 1995

Respectfully submitted,

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